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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1186

ORVILLE E. DENNIS,
Petitioner

v.

SIDNEY SPARKS and R. L. LYND, d/b/a
SIDNEY SPARKS, TRUSTEE,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SUBJECT INDEX

	Page
Table of Authorities	II
Opinions Below	1
Jurisdiction	2
Question Presented for Review—	
Whether a private citizen can be liable for damages under Title 42, United States Code, Section 1983, when he is an alleged co-conspirator with a state court judge who is immune from the Section 1983 claim under the doctrine of judicial immunity	2
Statutes Involved	2
Statement of the Case	3
Reasons for Granting the Writ—	
I. The decision of the court of appeals allowing the Respondents to maintain their complaint brought under Title 42, United States Code, Section 1983, against Petitioner, a private individual, is contrary to the public interest sought to be protected by the doctrine of judicial immunity as applied by this court in Section 1983 cases.	7
II. The decision of the court of appeals to allow the Respondents to maintain their complaint under Title 42, United States Code, Section 1983, against Petitioner, conflicts with the established rule followed by a majority of the courts of appeals. This Court has not ruled on the issue. The conflict needs to be resolved by this Court because of the effect on the public policy behind the doctrine of judicial immunity.	18
Summary	22
Conclusion	23
Certificate of Service	24
Appendix—	
District Court's Order	A1
District Court's Judgment	A4
Court of Appeals per curiam opinion	A5
Court of Appeals opinion on rehearing en banc	A11
Court of Appeals Judgment	A41
Court of Appeals Order denying Petition for Rehearing	A43

TABLE OF AUTHORITIES

CASES	Page
Adickes v. Kress & Co., 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970)	10, 17
Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966) cert. den. 386 U.S. 1021	18
Birley v. California, 564 F.2d 849 (9th Cir. 1977)	19
Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 20 L.Ed. 656 (1872)	7, 8, 9, 10, 14, 22
Brown v. Dunne, 409 F.2d 341 (7th Cir. 1969)	19
Butz v. Economou, 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978)	10
Farnsworth v. Zerbst, 98 F.2d 541 (5th Cir. 1938)	17
Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973)	18
French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970) cert. den. 401 U.S. 915	19
Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)	11
Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970)	19
Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965)	19
Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975)	19
Hazo v. Geltz, 537 F.2d 747 (3rd Cir. 1976)	18
Hill v. McClellen, 490 F.2d 859 (5th Cir. 1974)	19
Humble v. Foreman, 563 F.2d 780 (5th Cir. 1977)	19
Kermit Construction Corporation v. Banco Credito y Ahorro Ponceno, 547 F.2d 1 (1976)	19, 20, 21
Kurz v. State of Michigan, 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972, U.S. Reh. Den. 98 S.Ct. 1289	18, 19
Perez v. Borchers, 567 F.2d 285 (5th Cir. 1978) cert. den. 99 S.Ct. 109	19
Pierson v. Ray, 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967)	7, 9, 10, 11, 22
Rhodes v. Laurino, 444 F. Supp. 170 (E.D.N.Y. 1978)	19
Russell v. Town of Mamoroneck, 440 F. Supp. 607 (S.D. N.Y. 1977)	19
Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978)	9, 19
Sparkman v. McFarland, 601 F.2d 261 (7th Cir. 1979)	19, 20
Stump v. Sparkman, 435 U.S. 349, 364, 55 L.Ed.2d 331, 344, 98 S.Ct. 1099 (1978)	5, 7, 9, 10, 19, 21, 22
Sykes v. California Department of Motor Vehicles, 497 F.2d 197 (9th Cir. 1974)	19
United States v. Price, 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966)	20, 21
Waits v. McGowan, 516 F.2d 203 (3rd Cir. 1975)	18
Winslow v. Duval County Ranch Company, 519 S.W.2d 217 (Tex. Civ. App. 1975—Beaumont, writ ref'd n.r.e.)	3

Page

CONSTITUTION AND STATUTES

Title 18, United States Code, Section 242 21
Title 42, United States Code, Section 1983 .....
.....2, 3, 4, 5, 6, 7, 9, 10, 12, 13, 15, 16, 18, 20, 21, 22
Tex. Const. Art. XVI, Section 41 12
Tex. Penal Code, Section 36.02 12

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v.

SIDNEY SPARKS and R. L. LYND, d/b/a
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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Orville E. Dennis, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The District Court's memorandum order is unreported. It is included in the Appendix contained herein at Page A1. The judgment of the District Court appears in the Appendix at Page A4.

The first opinion of the Court of Appeals, the per curiam panel opinion, is reported at 588 F.2d 124, and appears in the Appendix at page A5. The opinion

of the Court of Appeals on rehearing en banc is unreported, but is included in the Appendix at page A11. The judgment of the Court of Appeals appears in the Appendix at page A41. The order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc of Appellee, Orville E. Dennis (Petitioner herein) appears in the Appendix at page A43.

JURISDICTION

The opinion of the Court of Appeals on rehearing en banc was filed on October 22, 1979. The judgment was entered on October 22, 1979. The order denying the Petition for Rehearing and Suggestion for Rehearing En Banc of Appellee Orville E. Dennis, Petitioner herein, was entered on December 14, 1979. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether a private citizen can be liable for damages under Title 42, United States Code, Section 1983, when he is an alleged co-conspirator with a state court judge who is immune from the Section 1983 claim under the doctrine of judicial immunity.

STATUTE INVOLVED

The federal statute involved is Title 42, United States Code, Section 1983 [Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13], which reads as follows:

> "Sec. 1983. Civil action for deprivation of rights
> Every person who, under color of any statute,

ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

In the District Court below, the Respondents allege that a Texas state district court judge, O. P. Carrillo, conspired with certain private individuals, Duval County Ranch Company, Clinton Manges, Clarence Martens and Petitioner, Orville E. Dennis, to deprive Respondents of their civil rights. The complaint for damages was brought under 42 United States Code, Section 1983.

In the Respondents' amended complaint, the alleged conspiracy is described as involving the conduct of Duval County Ranch Company in suing the Respondents in state district court to wrongfully enjoin the Respondents from certain activity on an oil and gas lease, the judge's entry of a temporary injunction, and Martens' and Petitioner's signing as individual sureties on the bond required under state law for issuance of the temporary injunction. The temporary injunction was dissolved on appeal to a Texas appellate court. *Winslow v. Duval County Ranch Company,* 519 S.W.2d 217 (Tex. Civ. App. 1975—Beaumont, writ ref'd n.r.e.).

The only allegations contained in the Amended Complaint as to Petitioner are the conclusory allegation that Petitioner "knew" about a conspiracy among the judge, Manges and Duval County Ranch Company to wrong-

fully injure the Respondents, and that Petitioner had participated in that conspiracy by signing the temporary injunction bond as an individual surety.

The District Court below, on motions to dismiss submitted by Petitioner and the other defendants below, dismissed the amended complaint against all defendants. The District Court in its memorandum order premised the dismissal upon the state court judge's immunity from suit under 42 U.S.C. Section 1983.

The District Court found that the state judge's action of entering the injunction was a judicial act within his authority and jurisdiction. The District Court reasoned that, but for the entry of the injunction by the state judge, the Respondents would not have suffered the alleged injury.

Assuming the allegations in the amended complaint to be true for purposes of the hearing on motions to dismiss, the District Court below found that the state judge participated in the alleged conspiracy in his role as judge. His action in the conspiracy, that is, entering the injunction, was a judicial act within his authority and jurisdiction. Thus, the District Court held, the state judge is immune from liability under Section 1983.

As to the complaint against the Petitioner and the other private alleged co-conspirators, the District Court held that a valid claim could not be stated against them under Section 1983. Because of the judge's immunity from suit, the other defendants had not conspired with a state officer against whom a valid claim could be stated under Section 1983.

By per curiam opinion dated January 17, 1979, a three judge panel of the Court of Appeals for the Fifth

Circuit, the Honorable Judges Wisdom, Godbold and Tjoflat, affirmed the trial court's dismissal of the complaint against both the state court judge and the private citizen defendants, including Petitioner. In that opinion, the Court of Appeals affirmed the dismissal of the complaint under the doctrine of judicial immunity as applied to 42 U.S.C. Section 1983 cases.

With respect to the private citizen defendants, including this Petitioner, the Court below held that the private citizens, in allegedly conspiring with a state judge, did not conspire with a person against whom a claim valid under 42 U.S.C. Section 1983 could be stated, and thus themselves were entitled to dismissal of claims made against them under that statute.

No petition for rehearing was filed nor was any motion to stay issuance of the mandate filed. Then, on March 9, 1979, notice was given by the clerk of the Court of Appeals of the entry of an order by a then majority of judges in active service, on the Court's own motion, to rehear the cause by the Court en banc with oral argument. Through its clerk, the appeals court below notified Petitioner and the other parties of its intent to reconsider en banc the holding of the panel affirming the dismissal of the complaint as to the private alleged co-conspirators. The clerk's notice referred specifically to a footnote, number 13, in a recent opinion of this Court, *Stump v. Sparkman,* 435 U.S. 349, at 364, 55 L.Ed.2d 331, at 344, 98 S.Ct. 1099 (1978).

The cause was submitted on rehearing to the Court of Appeals en banc on June 5, 1979. By opinion dated October 22, 1979, by a ten to four decision, the Court

of Appeals affirmed the panel's holding that the state court judge was immune from suit, but reversed as to the private alleged co-conspirators.

The majority in the en banc opinion on rehearing reasoned that, even though the state court judge is immune from suit under Section 1983, his participation in the alleged conspiracy, that is, his granting the temporary injunction, still gave the alleged conspiracy the requisite action under color of state law. Since the conspiracy had the requisite state action, a claim could be maintained under Section 1983 against the private citizen alleged co-conspirators.

This Petitioner filed a petition for rehearing and suggestion for rehearing en banc on November 5, 1979, which was overruled by order of the Court of Appeals entered on December 14, 1979. Upon Petitioner's motion for stay of issuance of mandate, the Court of Appeals stayed the mandate until February 1, 1980.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS ALLOWING THE RESPONDENTS TO MAINTAIN THEIR COMPLAINT BROUGHT UNDER TITLE 42, UNITED STATES CODE, SECTION 1983, AGAINST PETITIONER, A PRIVATE INDIVIDUAL, IS CONTRARY TO THE PUBLIC INTEREST SOUGHT TO BE PROTECTED BY THE DOCTRINE OF JUDICIAL IMMUNITY AS APPLIED BY THIS COURT IN SECTION 1983 CASES.

II.

THE DECISION OF THE COURT OF APPEALS TO ALLOW THE RESPONDENTS TO MAINTAIN THEIR COMPLAINT UNDER TITLE 42, UNITED STATES CODE, SECTION 1983, AGAINST PETITIONER, CONFLICTS WITH THE ESTABLISHED RULE FOLLOWED BY A MAJORITY OF THE COURTS OF APPEALS. THIS COURT HAS NOT RULED ON THE ISSUE. THE CONFLICT NEEDS TO BE RESOLVED BY THIS COURT BECAUSE OF THE EFFECT ON THE PUBLIC POLICY BEHIND THE DOCTRINE OF JUDICIAL IMMUNITY.

ARGUMENT AND AUTHORITIES

I.

THE DECISION OF THE COURT OF APPEALS ALLOWING THE RESPONDENTS TO MAINTAIN THEIR COMPLAINT BROUGHT UNDER TITLE 42, UNITED STATES CODE, SECTION 1983, AGAINST PETITIONER, A PRIVATE INDIVIDUAL, IS CONTRARY TO THE PUBLIC INTEREST SOUGHT TO BE PROTECTED BY THE DOCTRINE OF JUDICIAL IMMUNITY AS APPLIED BY THIS COURT IN SECTION 1983 CASES.

The American public is best served by judges who are principled, highly motivated, and fearless in their decision-making. *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L.Ed 656 (1872); *Pierson v. Ray,* 386 U.S. 547, 18 L. Ed.2d 288, 87 S.Ct. 1213 (1967); *Stump v. Sparkman,* 435 U.S. 349, at 364, 55 L.Ed.2d 331, at 344, 98 S.Ct.

1099 (1978). It was long ago recognized that it was in the public interest to protect judges from lawsuits brought complaining of their judicial decisions. *Bradley v. Fisher, supra.*

The purpose of the doctrine of judicial immunity is to enable judges to function in their duties ". . . without apprehension of personal consequences . . ." *Bradley v. Fisher,* 80 U.S. at 347. But the majority of the court of appeals below in the opinion on rehearing en banc would restrict the scope of the doctrine of judicial immunity to merely immunizing a judge from direct suit for money damages.

As expressed by this Court in the landmark decision in *Bradley v. Fisher, supra,* the concept of judicial immunity is important to preserve our system of jurisprudence. It is imperative that judges be immune from prosecution for their acts as judges.

What is the nature of the public purpose to be served by this doctrine? This Court emphasized in *Bradley* that the doctrine of judicial immunity is based upon sound public policy:

> "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of his freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge,

> it would establish the weakness of judicial authority in a degrading responsibility . . .
>
> "Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry . . ." *Bradley v. Fisher.* 80 U.S. at 347, 20 L.Ed. at 649-650.

Quoting from the case of *Floyd and Barker,* reported by Coke in 1608 (12 Coke 25), this Court in *Bradley* noted that if judges were subject to being questioned for their motives in their decisions as judges, such would "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations." *Bradley,* 80 U.S. at 348, 20 L. Ed. at 650.

In this Court's landmark decision in *Pierson v. Ray, supra,* this Court ruled that Congress, in enacting 42 U.S.C. Section 1983, did not intend to abolish the common law doctrine of judicial immunity. The Court has recently had the opportunity to reiterate that view in *Stump v. Sparkman, supra.*

This Court held in *Pierson* that the doctrine of judicial immunity is applicable in Section 1983 cases. This Court held that judges committing acts within their judicial jurisdiction are not "persons" liable under Section 1983.

Section 1983 makes no mention about private persons acting alone, nor about conspiracies between private citizens and state officials. It is settled that a private individual, acting alone, is not liable for damages under Section 1983. *Slavin v. Curry,* 575 F.2d 1256 (5th Cir.

1978). However, this Court has construed Section 1983 to encompass a conspiracy involving a private person and state officials if the private person was a "willful participant" in a conspiracy with agents or officials of the state. *Adickes v. Kress & Company,* 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970).

It is submitted that the doctrine of judicial immunity, as described by this Court in its opinions in *Bradley, Pierson,* and *Stump* is intended to do more than merely immunize a judge from personal liability for money damages.

The public policy enunciated in *Bradley* requires that a judge be free to make decisions within his jurisdiction "without apprehension of personal consequences to himself". *Bradley,* 80 U.S. at 347.

To insure that the public interest in a fearless judiciary is served, the doctrine immunizes judges from civil lawsuits concerning the motives behind their decisions. *Butz v. Economou,* 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978).

Should the doctrine of judicial immunity be narrowly construed to prohibit only direct suit against a judge, but to allow suit against the private co-conspirators in which the judge's motives and conduct would be in question? Petitioner submits that this Court has given a broader meaning to a judge's immunity. In *Pierson,* it was said:

> "His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute

> not to principled and fearless decision-making, but to intimidation." *Pierson*, 386 U.S. at 554, 18 L.Ed. 2d at 294-295.

The majority below has misconstrued the scope of the doctrine. They would have us believe that the harrassment and intimidation to be avoided arises only out of a direct suit against a judge. But what of a suit against persons with whom the judge is alleged to have conspired?

Contrary to the majority's narrow construction, the doctrine bars more than liability for money damages, it bars the trial itself. The doctrine is not merely a defense to be raised by a judge at trial. According to Judge Learned Hand, this is justified, because ". . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949).

Again quoting from this Court's opinion in *Pierson:*

> "This immunity . . . 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their function with independence and without fear of consequences.' " (citations omitted). *Pierson,* 386 U.S. at 554, 87 S.Ct. at 1218, 18 L.Ed. at 294.

Given the foregoing, it is submitted that the reasoning of the majority below conflicts with the purpose to be served by the doctrine of judicial immunity by too narrowly defining the scope of the doctrine. The majority

would retain the immunity of the judge from a direct lawsuit as a party defendant. But the majority would allow a lawsuit under Section 1983 against the alleged private co-conspirators. The attempt of the majority to draw a distinction here is logically misleading.

The majority's policy argument is that the harm from prohibiting an action against the private conspirators is greater than the harm resulting to the judiciary from permitting those actions.

What is the harm resulting from the majority rule? It is that the Respondents would be deprived of a remedy under federal law (42 U.S.C. Section 1983) which is cumulative of remedies available to them under Texas law.

There are both criminal and civil remedies provided under Texas law for the alleged complaint of the Respondents here. In Texas, persons injured by the wrongful issuance of an injunction can sue the private "conspirators" for damages. As a matter of fact, that is exactly what the Respondents have done. They have filed a suit seeking pecuniary damages now pending in the 229th Judicial District Court in Duval County, Texas: Cause No. 9524, "Sidney A. Sparks, Trustee vs. Duval County Ranch Co., et al."

There are criminal sanctions under Texas law for the kind of conduct alleged against the private individuals, involving bribery of a state official. Tex. Const. Art. XVI, Section 41; Tex. Penal Code, Section 36.02.

What is the harm from the minority rule espoused by the court below? Essentially, the minority rule permits a collateral attack on the judge's action. It permits indirect-

ly what the doctrine of judicial immunity prohibits. See the dissent below, Appendix at page A28.

First, the judge's involvement is unavoidable in a Section 1983 claim brought against only the private co-conspirators. To establish the plaintiff's case against the defendants, the plaintiff must raise the issue of the judge's alleged participation, his actions and motives. He must show that the judge participated in the conspiracy to deprive him of his civil rights. He must prove the judge's participation in order to establish the requisite state action under Section 1983.

Even though the plaintiff cannot directly force the judge to participate by making him a defendant, the plaintiff can intimidate and harass the judge merely by being able to bring the lawsuit under Section 1983 against others involved in the state court case.

Second, if judicial immunity protects the judge but suit is permitted against his alleged co-conspirators, the judge becomes the primary and principal witness for the defense against all charges brought against the co-conspirators. The unprotected co-conspirator may have to build his case around the testimony and statements of the involved judge. For an effective defense, the alleged co-conspirators will be compelled to subject the judge to certain discovery procedures and pre-trial practices so that all facts and legal issues can be developed. The judge might be subjected to testifying in trial and being required to explain his conduct, motives and sincerity to another judge and jury. Such actions will require a judge to become involved in the co-conspirator's defense and such actions will cause the judge to be diverted from his judicial position and responsibilities.

Is this what the public interest demands? Absolutely not. The public interest demands that a judge be free to act upon his own convictions without liability, fear or duty to answer to every person who feels aggrieved by the action or involvement of a judge. This Court stated in *Bradley v. Fisher, supra,* that "the public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent them from being harassed by vexatious actions." 80 U.S. at 349.

Third, the possibility of a judge being involved in the defense or prosecution of a private person on alleged conspiracy charges and the possibility of a judge being required to testify in such matters cause to be focused upon his judicial integrity. If there is anything the public demands and a judge should honor, it is his integrity as a judge and the effect of his integrity upon the judicial system as a whole. The public demands that a judge avoid evil or even the appearance of it. Yet, how can he maintain such integrity when he can still be made to submit to discovery, testify at trial and have his honor questioned. Unless the judge voluntarily enters the lawsuit as a defendant and waives his right of judicial immunity, he has no right to question his accusers. He is not even assured the right to remain in the courtroom to hear the testimony of the witnesses. To defend himself, his name, his honor, and his integrity, the judge is forced to waive his immunity or to enter the case voluntarily as a defendant. If this occurs, then the very rationale for the doctrine of judicial immunity has been undercut.

Fourth, public policy requires that the door to federal court not be opened wide to every aggrieved liti-

gant in a state court proceeding. Anyone dissatisfied with the result of the litigation in a state court can allege a conspiracy sufficient to obtain federal court review of his claim. Every trial in a state court, criminal or civil, carries the potential for a claim that the judge and other participants in the proceeding acted in knowing concert to deny federal rights. In this way, the judicial system can be abused and the opportunities for continually involving the judge in such litigation can effectively prevent the judge from exercising his responsibilities as a judicial officer.

Fifth, private persons should not be discouraged from or penalized for seeking the aid or judicial approval of a court before getting involved in certain legal activities. This is very important since it can be presumed that if the action is unconstitutional, the judge will be more likely to prevent it than the individual engaging in self-help will be to refrain from engaging in it. If the seeking of aid from a judicial officer is ever challenged as a conspiracy, then the seeking of aid or assistance from the judiciary by private persons will be stifled and discouraged because of the unavailability of judicial immunity protection. This certainly runs in opposition to the public's interest and needs.

As indicated, there exists imperative public policy reasons for the doctrine that a private citizen should not be held liable for damages when he or she is alleged to be a co-conspirator with a judge who is immune from such actions as a Section 1983 claim. The doctrine of judicial immunity should not be so eroded. If so, the judicial role is abrogated and forced to focus upon duties removed from a judge's responsibility.

A judicial officer should be free to act upon his own beliefs ". . . without apprehension of personal consequence . . ." to himself. If this "back door" approach of the court below is sustained, then the judicial officer can be prevented from acting upon his own beliefs and the personal consequence to himself will still exist.

Furthermore, the risks of widening the door to increased litigation to the detriment of the judicial system becomes imminent and the public may be discouraged from seeking any judicial assistance. Such harms are of sufficient concern for this Court to review the role of judicial immunity and correct the lower court's error to insure that the doctrine is clarified and utilized in a uniform way throughout the federal judiciary.

To say that the consequences of allowing prosecution of suits against the alleged co-conspirators will be inconsequential is contradicted by the lower court's knowledge of the many "jailhouse lawyer" lawsuits and writs filed with the federal district courts and with the Fifth Circuit itself. The present burden of these suits was noted by the attorneys and by the members of the lower court during the panel argument and the argument on rehearing.

One need only consider the number of reported cases under Section 1983 involving judges of various jurisdictions, criminal and civil, judges who allegedly acted with improper motives and judges who have allegedly grievously erred. Disgruntled litigants have not been reluctant to try to take on their judges through the vehicle of a Section 1983 suit in federal court.

The fallacy of the reasoning of the majority below is illustrated in its discussions of *Adickes* and *Farnsworth* (Appendix at pages A20-A24). *Adickes v. Kress & Co., supra; Farnsworth v. Zerbst,* 98 F.2d 541 (5th Cir. 1938). *Adickes* is cited in support of the majority's holding that the private conspirators can be sued without joining the state official as a defendant. *Farnsworth* is cited in support of the majority's holding that the private conspirators can be sued despite the immunity from suit of a co-conspirator.

As to both, the majority misses the distinction critical to a resolution of the instant case. Here, too, the state official is immune from suit. But the distinction lies in the nature of his immunity and the effect on that immunity of allowing suit against the private co-conspirators.

Allowing the private conspirators in *Adickes* to be sued, without the state official, did not compromise the rationale for the policeman's qualified immunity. Allowing the non-immune individuals in *Farnsworth* to be sued, without the immune foreign diplomat, did not compromise the rationale for diplomatic immunity.

Neither case involved a judge. Neither case involved the concept of judicial immunity. As explained above, a judge's immunity is a special concept and until now absolute in civil cases. But it will be undermined if suit is allowed against the judge's alleged co-conspirators.

II.

THE DECISION OF THE COURT OF APPEALS TO ALLOW THE RESPONDENTS TO MAINTAIN THEIR COMPLAINT UNDER TITLE 42, UNITED STATES CODE, SECTION 1983, AGAINST PETITIONER, CONFLICTS WITH THE ESTABLISHED RULE FOLLOWED BY A MAJORITY OF THE COURTS OF APPEALS. THIS COURT HAS NOT RULED ON THE ISSUE. THE CONFLICT NEEDS TO BE RESOLVED BY THIS COURT BECAUSE OF THE EFFECT ON THE PUBLIC POLICY BEHIND THE DOCTRINE OF JUDICIAL IMMUNITY.

The majority decision below is a reversal of a firmly established position in the Court of Appeals for the Fifth Circuit. The decision on rehearing now places the Fifth Circuit alongside the First Circuit as a minority of circuits espousing the belief that Section 1983 suits against a judge's co-conspirators should be allowed.

In a majority of the courts of appeals which have considered the issue here, the rule is and has been that no cause of action can be stated under Section 1983 against a private citizen who has allegedly conspired with a state court judge who is himself immune from prosecution under Section 1983 because of the doctrine of judicial immunity. The rule has been followed by the Third Circuit in *Hazo v. Geltz,* 537 F.2d 747 (3rd Cir. 1976), *Waits v. McGowan,* 516 F.2d 203 (3rd Cir. 1975) and *Bauers v. Heisel,* 361 F.2d 581 (3rd Cir. 1966) cert. den. 386 U.S. 1021; by the Fourth Circuit in *Fowler v. Alexander,* 478 F.2d 694 (4th Cir. 1973); by the Sixth Circuit in *Kurz v. State of Michigan,* 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972,

U.S. Reh.Den. 98 S.Ct. 1289; by the Seventh Circuit in *Hansen v. Ahlgrimm,* 520 F.2d 768 (7th Cir. 1975), *French v. Corrigan,* 432 F.2d 1211 (7th Cir. 1970) cert. den. 401 U.S. 915, and *Brown v. Dunne,* 409 F.2d 341 (7th Cir. 1969); and by the Ninth Circuit in *Haldane v. Chagnon,* 345 F.2d 601 (9th Cir. 1965), *Sykes v. California Department of Motor Vehicles,* 497 F.2d 197 (9th Cir. 1974), and *Birley v. California,* 564 F.2d 849 (9th Cir. 1977).

In the Second Circuit, this majority rule was followed in *Russell v. Town of Mamoroneck,* 440 F. Supp. 607 (S.D.N.Y. 1977) and *Rhodes v. Laurino,* 444 F.Supp. 170 (E.D.N.Y. 1978).

The majority rule had been followed by the Fifth Circuit for a decade: *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970); *Hill v. McClellen,* 490 F.2d 859 (5th Cir. 1974); *Humble v. Foreman,* 563 F.2d 780 (5th Cir. 1977); *Perez v. Borchers,* 567 F.2d 285 (5th Cir. 1978), cert. den. 99 S.Ct. 109; *Slavin v. Curry,* 575 F.2d 1256 (5th Cir. 1978).

Until the decision on rehearing below, the exception among the circuits was the decision of the Court of Appeals for the First Circuit in *Kermit Construction Corporation v. Banco Credito y Ahorro Ponceno,* 546 F.2d 1 (1976).

As the dissent in the opinion below notes, the position of the Seventh Circuit is now unclear because of the highly fractionated en banc opinion in *Sparkman v. McFarland,* 601 F.2d 261 (7th Cir. 1979). Appendix, n. 5, page A33. After this Court's decision in *Stump v. Sparkman, supra,* the subject issue of whether a claim can be

stated against the co-conspirators was submitted on remand to the Seventh Circuit in *Sparkman v. McFarland.*

The en banc opinion in *Sparkman v. McFarland* consists of a per curiam order and four concurring opinions. The Court of Appeals for the Seventh Circuit affirmed the distrtict court's dismissal of the Section 1983 conspiracy claim against the private defendants after the state judge was held to be immune. Two judges were of the opinion that the issue was not properly before the court. Three judges would allow Section 1983 suits even when the state actor is immune, but they would impose on the plaintitff the burden of a particularized pleading requirement.

Until the decision below on rehearing, the First Circuit stood alone as having squarely met the subject issue and having allowed the Section 1983 claim against the private conspirators. In *Kermit* the court attempted to premise its holding on this Court's opinion in *United States v. Price,* 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966). However, in reality, the court's decision was based on semantics, much like that of the court below. It reasoned that, immune or not, the state official provided the requisite state action. Anyone conspiring with that state official was therefore acting under color of state law. *Kermit,* 547 F.2d at 3.

Kermit does not even involve a state judge. *Kermit* involved a Section 1983 action brought against a bank, a construction corporation, and a court-appointed receiver. It was alleged that all of the defendants conspired to put the corporation into receivership and avoid paying a debt to the appellant. The court explained that the receiver should share a judge's judicial immunity. The court

further held that the remaining private defendants could not "seek shelter of judicial immunity" even though the receiver was himself immune.

In regard to *United States v. Price, supra,* the only authority cited by *Kermit,* that case is distinguishable from the instant case in several respects. It did not involve a judge as an alleged co-conspirator. It did not involve the effect of judicial immunity on the liabilitty of private co-conspirators under Section 1983. Instead, it involved 18 U.S.C.A. Section 242, a criminal statute. However, the Supreme Court refers to Section 1983 as the civil counterpart to said Section 242. And finally, *Price* involves outrageous and criminal conduct, clearly outside the scope of any acknowledged immunity, i.e. murder.

Kermit notwithstanding, the majority opinion below meets square on the public policy reasons for the majority rule. It is this attempt to weaken the doctrine of judicial immunity in Section 1983 cases which should be corrected by this Court.

This Court has previously noted the split of authority on this issue. *Stump v. Sparkman,* n. 13, 435 U.S. at 364; 55 L.Ed.2d at 344. We have not found any opinions by this Court in which this issue was squarely before the Court. There now exists inconsistent views regarding judicial immunity and private citizen conspirators, and there exists competing and conflicting decisions among the various courts of appeals. To achieve uniformity among the federal courts of appeals, it is respectfully submitted that this Court should review, clarify and decide this issue. As was encouraged by the dissent in the opinion on rehearing below, ". . . we suggest that this decision

will not be the last word on this subject, and we respectfully dissent." Appendix, page A40.

SUMMARY

Presented in this Petition is an issue of paramount importance to the public interest. It should be clear from this Court's opinions in *Bradley, Pierson* and *Stump* that judicial immunity is more than mere immunity from liability for pecuniary damages. As stated in *Bradley,* it is immunity from ". . . apprehension of personal consequences . . ." to the judge. It is intended to shelter the judge from intimidation and harassment. As discussed above, the judge is threatened as much from a collateral attack as he is from a direct suit against him.

However, the majority of the court below would confine the scope of judicial immunity in Section 1983 cases. That majority has adopted a minority viewpoint, which conflicts with the viewpoint of all but one of the circuits which have had the opportunity to consider the issue.

Simply stated, the illogic of the view espoused by the court below conflicts with the purpose of judicial immunity in Section 1983 cases.

It is respectfully submitted that the Supreme Court should exercise its power of supervision over the federal circuit courts and resolve the issue in favor of the doctrine of judicial immunity. Public policy is best served by the majority rule among the circuit courts. It is not in the public interest to sacrifice the doctrine of judicial immunity to extend in one case to a complainant a federal remedy which is cumulative of other adequate remedies.

CONCLUSION

For the reasons set forth above, Petitioner, Orville E. Dennis, prays that this Court enter its Order directing that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit below, and upon such review that this Court reverse the judgment below insofar as it reverses the district court's dismissal of the complaint against Petitioner and the other defendants below, and that this Court affirm the judgment of the district court below dismissing the complaint against this Petitioner and the other defendants below.

Respectfully submitted,

ORVILLE E. DENNIS, *Petitioner*

By: _____

FINLEY L. EDMONDS
Post Office Box 2624
1515 Bank & Trust Tower
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following parties, or where represented by counsel, to the counsel of record in the court below: Mr. Garland Smith, P.O. Drawer 1104, Weslaco, Texas 78596; Mr. Clarence Martens, #5 Northwood, Del Mar Hills, Laredo, Texas; Mr. Raul Garcia, 208 N. Cameron, Alice, Texas 78332; and Hon. Mark White, Attorney General, P.O. Box 12548, Austin, Texas 78711, Attn: Ms. Laura Martin, Asst. Attorney General; on the _____ day of January, 1980.

FINLEY L. EDMONDS
P.O. Box 2624
1515 Bank & Trust Tower
Corpus Christi, Texas 78403

APPENDIX

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C.A. NO. 76-C-2

SIDNEY A. SPARKS, ET AL.

V.

DUVAL COUNTY RANCH COMPANY, ET AL.

Filed: December 17, 1976

ORDER

Plaintiffs brought this suit pursuant to 42 U.S.C § 1983, alleging damages as a result of Defendant O. P. Carrillo's entry of an injunctive order against Plaintiffs. Carrillo had been judge of the 229th District Court of Duval County, Texas, when he entered an order enjoining production of minerals from certain leases owned by Plaintiffs. Plaintiffs joined all other Defendants as co-conspirators in the alleged plan to deprive Plaintiffs of their civil rights.

Defendant Carrillo has moved for dismissal of this action, asserting the doctrine of judicial immunity as basis for his motion. All other Defendants assert Carrillo's immunity and urge that, because of such immunity, no state action claim can be asserted.

The doctrine of judicial immunity is deeply engrained in our jurisprudence. Generally, immunity extends to

those judicial acts done within the judge's jurisdiction. *Pierson v. Ray,* 386 U.S. 547 (1966). Civil rights suits are also subject to a claim of judicial immunity. *Pierson, supra,* at 554. In *Hill v. McClellan,* 490 F.2d 859 (5th Cir. 1974), the Fifth Circuit stated that judges are immune if "acting within their jurisdiction and authority." *Hill, supra,* at 860. It is clear that Carrillo's action of entering an injunction was a judicial act within his authority, and the land in question was within his jurisdiction.

Even if an order is entered "maliciously or corruptly," judicial immunity applies. *Cadena v. Peraso,* 498 F.2d 383 (9th Cir. 1974). A footnote in the Supreme Court's decision in *Pierson, supra,* stated: "Petitioner attempted to suggest a 'conspiracy' between Judge Spencer and the police officers by questioning him about his reasons for finding Petitioner guilty . . . . The proof of conspiracy never went beyond this suggestion that inferences could be drawn from . . . judicial decisions." *Pierson, supra,* at note 8, pp. 553-54. Plaintiffs contend that a conspiracy did exist in their case. The Fifth Circuit has recently dealt with the question of judicial immunity in a conspiracy charge, and has rejected the suggestion of *Pierson* that an alleged judicial conspiracy could remove immunity. In *Smart v. Jones,* 530 F.2d 64 (5th Cir. 1976), the Court held that immunity applied even where a conspiracy was alleged, and dismissed the charges. This Court therefore concludes that Defendant Carrillo is immune from liability in this action and his motion to dismiss must be granted.

The removal of Defendant Carrillo from this case effectively destroys a claim founded on 42 U.S.C. § 1983.

In *Haldane v. Chagnow,* 345 F.2d 600 (9th Cir. 1965), a conspiracy involving a judge was alleged in a § 1983 suit. That Court found that the defendant judges enjoyed immunity from suit. The Court held that "with the elimination of the defendant judges and bailiff from the case, claims against [the other defendants] under the Civil Rights Act" could not be stated.

> "The [other defendants] were not State officers and they did not act in conspiracy with a state officer against whom appellant could state a valid claim. It follows that they did not and could not commit the alleged wrongful acts 'under color of state law or authority.'" *Haldane, supra,* at 604.

Therefore, the claims against the remaining Defendants must also be dismissed for failure to state a claim upon which relief can be granted.

The motions of Defendants Duval County Ranch Company, Inc., Clinton Manges, Clarence Martens, Orville E. Dennis, and O. P. Carrillo to dismiss are hereby granted.

IT IS SO ORDERED.

SIGNED this 17th day of December, 1976.

/s/ OWEN D. COX
United States District Judge

IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CA. NO. 76-C-2

SIDNEY A. SPARKS, ET AL.

V.

DUVAL COUNTY RANCH COMPANY, ET AL.

Filed: December 20, 1976

JUDGMENT

For the reasons stated in this Court's memorandum and order entered on December 17, 1976, this case is hereby dismissed.

IT IS SO ORDERED.

SIGNED this 20th day of December, 1976.

/s/ OWEN D. COX
United States District Judge

Sidney A. SPARKS, R. L. Lynd, d/b/a
Sidney A. Sparks, Trustee,
Plaintiffs-Appellants,

v.

DUVAL COUNTY RANCH
COMPANY, INC., et al.,
Defendants-Appellees.

No. 77-1249.

United States Court of Appeals,
Fifth Circuit.

Jan. 17, 1979.

In an action against a former state court judge and other defendants, under the 1871 civil rights statute, the United States District Court for the Southern District of Texas at Corpus Christi, Owen D. Cox, J., dismissed the complaint. Plaintiffs appealed. The Court of Appeals held that: (1) the state court judge's act in entering a temporary injunction was protected by judicial immunity even if it was induced by a bribe from a party to suit, and (2) the state court judge being immune from liability, the remaining defendants, being all private citizens, did not conspire with any person against whom a valid claim could be stated under the 1871 civil rights statute, and thus the claim as against other defendants was also properly dismissed.

Affirmed.

* * *

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, GODBOLD and TJOFLAT, Circuit Judges.

PER CURIAM:

This case involves judicial immunity from liability under the Civil Rights Act of 1871, 42 U.S.C. § 1983. For purposes of the motion to dismiss the complaint, we must assume that the judge in question accepted a bribe. Decisions of the Supreme Court and this Court require us to adhere to the doctrine of judicial immunity. Accordingly, we affirm the district court's dismissal of this action.

According to the complaint, the plaintiffs, trustees, operated oil and gas wells on land adjacent to property owned by the defendant Duval County Ranch Company, Inc. (DCRC), a corporation wholly owned by the defendant Clinton Manges. The complaint alleges that Manges entered into a conspiracy with the defendant O. P. Carrillo, who served as a judge of the 229th District Court of Duval County, Texas, from November 1970 to January 23, 1976, when he was removed from office by the Texas Senate.[1] Under the alleged conspiracy, Manges bestowed financial favors upon Carrillo, who in return would rule as Manges directed in cases before his court.

The complaint charges that, on August 15, 1972, Manges filed suit in Carrillo's court to enjoin the plain-

1. The Supreme Court of Texas also removed Carrillo from the bench. *See Matter of Carrillo*, 1976 Tex., 542 S.W.2d 105. According to the most recent submission in this case by the Attorney General of Texas, Carrillo is presently incarcerated in a federal penitentiary on income tax charges.

tiffs' oil production. Manges alleged that the plaintiffs' operations were polluting DCRC's land. According to the complaint, Manges's true motivation was to stop the plaintiffs' production and thereby cause their oil lease to be terminated under the nonproduction clause it contained. The complaint next asserts that, at Manges' direction, Carrillo entered an order on January 18, 1973, temporarily enjoining the plaintiffs' oil production. The defendants Clarence Martens and Orville Dennis served as sureties for the injunction bond. That temporary injunction remained in effect until June 25, 1975, when the Texas Court of Civil Appeals dissolved it. *Winslow v. Duval County Ranch Company,* 1975, Tex. Civ. App., 519 S.W.2d 217. The complaint asserts that, because of the conspiracy between Manges and Carrillo, the plaintiffs lost over two years of oil production on the land in question. The complaint states a claim under 42 U.S.C. § 1983 for the alleged conspiracy to deprive the plaintiffs of their oil production. The complaint also states a pendent state claim based on the alleged wrongful injunction.

The district court dismissed the complaint. It determined that judicial immunity barred suit against Carrillo and that, with the state judge eliminated as a defendant, there were no § 1983 claims under color of state law against the remaining defendants.

[1] Because we are reviewing a dismissal for failure to state a claim upon which relief can be granted, we must assume the existence of all facts pleaded in the complaint. The defendants argue that Carrillo's act in entering the temporary injunction is protected by judicial immunity

even if it had been induced by a bribe from Manges. We must agree.

Over a century ago, the Supreme Court embedded judicial immunity into our jurisprudence. In *Bradley v. Fisher,* 1872, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646, the Court stated that it is "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself". Therefore, the Court held that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly". 80 U.S. at 351. The Court drew a distinction between acts in excess of jurisdiction, which are protected by immunity, and acts in the clear absence of all jurisdiction, which are unprotected. The Court illustrated this distinction by stating that a probate judge with jurisdiction over only wills and the settlement of estates who tried a criminal case would be acting in clear absence of all jurisdiction, while a criminal court judge who convicted a defendant of a nonexistent crime would merely be acting in excess of jurisdiction. 80 U.S. at 351-52.

In *Pierson v. Ray,* 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288, the Court held that judicial immunity applied to suits under 42 U.S.C. § 1983:

> This immunity applies even when the judge is accused of acting maliciously and corruptly . . . . His errors may be corrected on appeal, but he should

> not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption.

386 U.S. at 554, 87 S.Ct. at 1218. The Court recently reaffirmed that a judge may be liable in a civil action only when his act was in the clear absence of all jurisdiction. *Stump v. Sparkman,* 1978, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331. *See also Imbler v. Pachtman,* 1976, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (prosecutorial immunity).[2]

[2, 3] Because it is clear that Carrillo had jurisdiction over the action filed by Manges against the plaintiffs, we must affirm the district court's determination that Carrillo's act in entering the temporary injunction was cloaked with judicial immunity.[3] Since Carrillo is im-

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2. This Court has faithfully followed this line of cases by applying judicial immunity even when corrupt or otherwise intentionally wrongful judicial acts are alleged. *See Slavin v. Curry,* 5 Cir. 1978, 574 F.2d 1256; *Perez v. Borchers,* 5 Cir. 1978, 567 F.2d 285; *Humble v. Foreman,* 5 Cir. 1977, 563 F.2d 780; *Connor v. Pickett,* 5 Cir. 1977, 552 F.2d 585; *Keeton v. Guedry,* 5 Cir. 1976, 544 F.2d 199; *Ford v. Byrd,* 5 Cir. 1976, 544 F.2d 194; *Grundstrom v. Darnell,* 5 Cir. 1976, 531 F.2d 272; *Cheramie v. Tucker,* 5 Cir. 1974, 493 F.2d 586; *cert. denied,* 419 U.S. 868, 95 S.Ct. 126, 42 L.Ed.2d 107; *Hill v. McClellan,* 5 Cir. 1974, 490 F.2d 859; *Williams v. Sepe,* 5 Cir. 1973, 487 F.2d 913; *McAlester v. Brown,* 5 Cir. 1972, 469 F.2d 1280; *People of Mississippi ex rel. Giles v. Thomas,* 5 Cir. 1972, 464 F.2d 156; *Carter v. Duggan,* 5 Cir. 1972, 455 F.2d 1156; *Collins v. Moore,* 5 Cir. 1971, 441 F.2d 550; *Perkins v. United States Fidelity & Guaranty Co.,* 5 Cir. 1970, 433 F.2d 1303; *Guedry v. Ford,* 5 Cir. 1970, 431 F.2d 660; *Beard v. Stephens,* 5 Cir. 1967, 372 F.2d 685; *Carmack v. Gibson,* 5 Cir. 1966, 363 F.2d 862.

3. We are aware that several commentators have concluded that judges should be protected by only a qualified immunity. *See Pierson v. Ray,* 1967, 386 U.S. 547, 558-67 & n.6, 87 S.Ct. 1213, 18 L.Ed.2d 288 (Douglas, J., dissenting); Kates, *Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered,* 65 N.W.U.L. Rev. 615 (1970); Note, *Immunity of Federal and State*

mune, the remaining defendants, who are all private citizens, did not conspire with any person against whom a valid § 1983 claim can be stated. Thus, the district court also properly dismissed the § 1983 claim against the other defendants. *Slavin v. Curry,* 5 Cir. 1978, 574 F.2d 1256; *Perez v. Borchers,* 5 Cir. 1978, 567 F.2d 285; *Humble v. Foreman,* 5 Cir. 1977, 563 F.2d 780; *Hill v. McClellan,* 5 Cir. 1974, 490 F.2d 859; *Guedry v. Ford,* 5 Cir. 1970, 431 F.2d 660. With the federal claim dismissed, of course, the district court did not err in dismissing the pendent state claim.

AFFIRMED.

Judges from Civil Suit—Time for a Qualified Immunity?, 27 Case W. Res. L. Rev. 727 (1977); Comment, *Charity Begins at Home: Judicial Immunity in Iowa,* 58 Iowa L. Rev. 197 (1972); Note, *Liability of Judicial Officers Under Section 1983,* 79 Yale L. J. 322 (1969). *See also* Brazier, *Judicial Immunity and the Independence of the Judiciary,* 1976 Pub. Law 397; Judge, Schirott & Bliss, *Judicial Immunity Under the Civil Rights Act: Here Come the Judge's Defenses,* 7 John Marshall J. Prac. & Proc. 213 (1974); McCormack & Kirkpatrick, *Immunities of State Officials Under Section 1983,* 8 Rutgers-Camden L. J. 65, 69-82 (1976).

Sidney A. SPARKS, R. L. Lynd, d/b/a
Sidney A. Sparks, Trustee,
Plaintiffs-Appellants,

v.

DUVAL COUNTY RANCH
COMPANY, INC., et al.,
Defendants-Appellees.

No. 77-1249.

United States Court of Appeals,
Fifth Circuit.

Oct. 22, 1979.

In an action brought under the 1871 Civil Rights Act against a former state court judge and others, the United States District Court for the Southern District of Texas, at Corpus Christi, Owen D. Cox, Jr., dismissed the complaint, and plaintiffs appealed. The Court of Appeals, 588 F.2d 124, affirmed. On reconsideration en banc, the Court of Appeals, Gee, Circuit Judge, held that coconspirators act under color of law and can be sued for damages in an action brought under the Civil Rights Act of 1871 when they involve a judge in their plot, regardless of whether the judge can be brought to justice for his part in the scheme.

Affirmed in part and reversed in part.

Coleman and Ainsworth, Circuit Judges, with whom Roney, Circuit Judge, joined, filed a dissenting opinion.

Appeal from the United States District Court for the Southern District of Texas.

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH, Circuit Judges.*

GEE, Circuit Judge:

We consider this case en banc to review the holding of our panel that private citizens, in conspiring with a state judge, did not conspire with any person against whom a claim valid under 42 U.S.C. § 1983 could be stated and thus themselves were entitled to dismissal of claims made against them under that statute. The panel, like the district court, acted under constraint of our prior opinions, opinions that it could not properly overrule. We can and do.

[1] The material allegations in this case are set out in the panel opinion, 588 F.2d 124, 5 Cir., and we restate only those necessary to an understanding of our present holding.[1] It is asserted that state judge O. P. Carrillo conspired with the four private defendants to deprive the plaintiffs of their oil production. This the judge did by entering an injunction, within his judicial powers to grant, prohibiting plaintiffs from producing certain oil. It is

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* Judges Johnson, Garza, Henderson, Reavley, Politz, Hatchett, Anderson and Randall did not participate in the consideraton of or decision in this case. The case was taken under submission by the court en banc on June 5, 1979.

1. The allegations set out in the panel opinion and partially restated here are merely the unproven assertions of the complaint that must be taken as true in the posture of this case, the complaint having been dismissed for failure to state a claim upon which relief could be granted even if the allegations proved true.

claimed that one of the defendants, Manges, bribed him to do this, while the other two, in knowing furtherance of the conspiracy, acted as sureties for the injunction bond. Carrillo was, of course, unqualifiedly immune from suit for the damages occasioned by his judicial act, and as to him the suit was correctly dismissed. *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). Under the authority of a line of cases,[2] commencing in 1970 with *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970), the private defendants obtained dismissal of the complaint's claims against them as well. It is these cases, insofar as they extend a derivative immunity to private persons who conspire with judges, that we overrule today.

We are met at the outset by several technical arguments questioning the propriety of our addressing, and perhaps our power to address, the issue of derivative immunity that we decide today. It is said that the matter was not raised below and, if so, was not properly pleaded; was not raised in briefs to our panel; and was not taken en banc by us within the applicable time limits.

[2] As for the district court pleadings, we have examined them and find the matter sufficiently raised and properly pleaded. Whatever immunity the private defendants derived from Judge Carrillo was a matter of defense for them to plead. It was not necessary that plaintiffs negative this or any other defense in their pleadings. The first amended complaint asserts the existence of a conspiracy in considerable detail; and while we agree that

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2. *Slavin v. Curry,* 574 F.2d 1256 (5th Cir.), *modified on other grounds,* 583 F.2d 779 (1978); *Perez v. Borchers,* 567 F.2d 285 (5th Cir.), cert. denied, 439 U.S. 831, 99 S.Ct. 109, 58 L.Ed.2d 126 (1978); *Humble v. Foreman,* 563 F.2d 780 (5th Cir. 1977); *Hill v. McClellan,* 490 F.2d 859 (5th Cir. 1974); *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970).

mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss, *Slotnick v. Staviskey,* 560 F.2d 31 (1st Cir. 1977), we think the plaintiffs' pleadings sufficiently stated the facts on which they relied.[3]

[3] We have also examined the briefs to the panel. Appellants show the private party defendants as appellees and certify them as persons interested in the appeal's outcome. The briefs of the two appellees who filed, which were adopted by the other appellees, similarly certify the private party defendants as appellees. There is no question that all knew they were before the court. The issue as stated by appellants was certainly broad enough to cover immunity or want of it in the private parties.[4] And

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3. Appellee Dennis, for example, complains that the pleadings as to him were insufficient. They were:

> MANGES, knowing that such a bond would be required, had previously arranged for Defendants MARTENS and DENNIS to participate in this conspiracy by signing as sureties on the injunction bond required by law. MARTENS and DENNIS, being aware of the unlawful purpose of the conspiracy and of the roles played by MANGES and CARRILLO therein, did in fact sign such injunction bonds as sureties thereto, which actions in concert with MANGES, CARRILLO, and DCRC, did aid such conspiracy and damage Plaintiffs as hereinafter alleged.

Thus it was alleged that Martens and Dennis participated in the conspiracy, knowing its unlawful purpose as well as the roles of Manges and Carrillo, by performing a specific act to forward the conspiracy. Certainly, in the absence of any motion for more definite statement, this was adequate.

4. Appellants' briefs reads:

> Does the doctrine of judicial immunity render a Complaint subject to dismissal for failure to state a claim upon which relief can be granted when the Complaint alleges a violation of civil rights under 42 U.S.C. § 1983 by a state judge and others acting in concert with him and contains specific, factual allegations of an extra-judicial agreement between the judge and his co-conspirators that the judge would abuse his judicial office for the pecuniary benefit of his co-conspirators and further contains specific allegations of the subsequent abuse of judicial office in furtherance of the conspiracy.

while we agree with appellees that the overwhelming emphasis in the arguments to the panel was on the immunity *vel non* of Judge Carrillo, the brief of Mr. Dennis, the private appellee whose brief was adopted by all others, does assert, albeit perfunctorily, their own immunity deriving from that of Carrillo. Finally, when we took the case en banc on rehearing of the panel's opinion and judgment, there can be no doubt that the appeal remained pending before the court, and we directed all parties' attention to this aspect of the broad issue before us.[5]

[4, 5] Finally, it is asserted that the court somehow lost jurisdiction to hear the cause en banc when no motions for rehearing were filed to the panel and the 21-day period specified for issuance of the mandate by Rule 41, Federal Rules of Appellate Procedure, passed. Even cast in its worst light, that the court lay under a duty imposed by the "shall" language of Rule 41 to issue mandate within that time span, we do not think a failure to perform that duty punctually would deprive the court of jurisdiction. The rule grants us power to shorten or enlarge the specified period by order. This we did by instructions to the clerk to withhold issuance of the mandate. There is

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5. The letter of our clerk, Mr. Wadsworth, sent by our direction to counsel for all parties, reads in pertinent part:
The issue with which the Court en banc is concerned is that reflected in the holding that:

> Since Carrillo is immune, the remaining defendants, who are all private citizens, did not conspire with any person against whom a valid § 1983 claim can be stated. Thus, the district court also properly dismissed the § 1983 claims against the other defendants.

588 F.2d at 126 [headnote 2]. In other words, the Court wishes to reconsider the holding that Judge Carrillo's alleged co-conspirators—the private citizens—effectively share his immunity, since "they did not conspire with a person against whom a valid § 1983 claim can be stated." *See Stump v. Sparkman*, 1978, 435 U.S. 349, 364 n.13, 98 S.Ct. 1099, 55 L.Ed.2d 331.

no requirement in the rule that such an order be formal, written, or that the parties be given notice of it, though this might be desirable. And even had there been no order, our jurisdiction would not have been affected, though it may be that in a proper case we might have been subject to a peremptory writ. Finally, our power to recall and reform a mandate even after issuance is, though not specifically provided for in the rules, well established, and no motion is required for us to hear or rehear a cause en banc. Rule 35(a), Fed.R.App.P.

Since we find that the issue of the derivative immunity of private persons who conspire with a judge is properly before us, we turn now to the substance of that matter. We begin our inquiry with a recognition that the absolute immunity that judges enjoy exists for the benefit of the judicial system and of the public, not for that of the judge. Only a hero could exercise an unfettered judgment while facing, day after day and case after case, the prospect of personal ruin implicit in permitting every losing party to sue him for damages. There have never been enough heroes to go around, and a sound policy must deal with the prospect that some who occupy the bench may not be of that ilk.

[6] In this imperfect world, however, where even the moon has a dark side, this manifestly necessary policy has the unfortunate effect of insulating not only the robe, but the person within it, from being called to account for actions that may be illegal, even corrupt, as is alleged here. This undesirable side effect of an otherwise valuable prescription can, as to the magistrate himself, be safely mitigated only slightly. All authorities[6] recognize that

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6. These range from *Bradley v. Fisher*, 13 Wall. 335, 351-52, 20 L.Ed. 646, 651 (1872), to *Stump v. Sparkman*, 435 U.S. 349, 98

when a judge acts in a "clear absence of all jurisdiction" he is not protected. But any broader or less explicit inroad upon the robe's immunity in an attempt to reach its wearer would invite recurring attempts at enlargement, ruinous in terms of judicial time and funds expended to defend—even successfully—against them. Thus the rule of judicial immunity from damages, with its single, bright-line exception, is as broad as, but no broader than, is necessary.

[7] Even so, the rule is a harsh one, laden with potential for unredressed wrong. As such, its scope should not be extended beyond that necessary to preserve the judge's independence of mind and judgment, for it is upon the manifest necessity to protect these, and on that alone, that the rule rests. When this is clearly seen, it becomes equally clear that no sound policy supports conferring any such immunity on private persons who persuade a judge to exercise his jurisdiction corruptly. Indeed, the thrust of wisdom is to the contrary. Sound policy suggests that attempts by such persons to subvert the judiciary should be penalized in every just way, civil as well as criminal. It suggests that the fullest redress that the judicial system can accommodate while functioning effectively should be granted for such odious wrongs. And it suggests that the actual incentive to corruption held out by the present doctrine, with its promise of civil immunity to those who succeed in involving a judge's powers in their nefarious schemes, should be removed.

S.Ct. 1099, 55 L.Ed.2d 331 (1978). An even earlier formulation of the doctrine in *Randall v. Brigham*, 7 Wall. 523, 536, 19 L.Ed. 285, 291 (1869), that judges "are not liable to civil action for their judicial acts, even when such acts are in excess of their jurisdiction, unless . . . the acts, in excess of jurisdiction, are done maliciously or corruptly," was pruned of qualifying language by *Bradley*.

[8] To be sure, the extension of derivative immunity to private persons alleged to have conspired with a judge eliminates one problem. Every trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge (or judges) and whatever other participants the pleader's fancy may light upon acted in knowing concert to deny federal rights protected by section 1983. Mischievous damage suits of this sort license the ill-disposed to require judges to appear and testify. But the benefit that derivative immunity would accord in protecting judges from an obligation to testify in the trial of their alleged coconspirators, while not wholly illusory, is comparatively insignificant. There already exist many situations in which a judge is amenable to legal process, and these have not proved ruinous to the functioning of the judicial system. For example, we have never held that judges are immune from claims for equitable relief, and both we and the Supreme Court have intimated the contrary. *See Wood v. Strickland,* 420 U.S. 308, 315 n.6, 95 S.Ct. 992, 997 n.6, 43 L.Ed.2d 214 (1975) ("immunity from damages does not ordinarily bar equitable relief as well"); *United Steelworkers of America, AFL-CIO v. Bishop,* 598 F.2d 408, 413 (5th Cir. 1979) (leaving open possibility judge "may be the object of equitable relief in proper cases"); *United States v. McLeod,* 385 F.2d 734, 738 n.3 (5th Cir. 1967) (observing that *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967), while holding "that judges are immune from liability for *damages* in suits under 42 U.S.C. § 1983 . . . does not . . . mean that they may not be enjoined from pursuing a course of unlawful conduct"). Nor, of course, does immunity exist for judges under the criminal law or from normal civil process where

a judge happens to be a witness to an incident giving rise to a lawsuit. And habeas proceedings sometimes require the judge's testimony. We therefore doubt that the cause of keeping state judges off our witness stands and in their courtrooms with respect to conspiracy trials is critical to the effective functioning of the judicial system. Moreover, any good conferred by the incremental degree to which the derivative immunity rule might protect state court judges from interruption of their courtroom duties by an obligation to testify seems greatly outweighed by the advantages gained by punishing those who subvert the judiciary, as discussed by us above.

So much, then, for policy, a matter entirely proper for our thorough exploration in view of the judge-made character of the doctrines under examination. We turn next to logical considerations, it being pressed upon us that a derivative immunity for judges' coconspirators follows ineluctably from established concepts, concepts both of state action and of general conspiracy law. As an analytical tool, let us posit the hardest hypothetical case, that of only two conspirators, one a private party and the other a state judge whose judicial order injuring federally protected rights constitutes the sole state action and the only overt act taken or needed to consummate the scheme. Both the conspiracy, since it takes two to conspire, and the section 1983 case, since it requires state action, therefore turn on the judge's involvement. How, as a matter of reason, can either be found to exist, it is asked, when the judge is immune from suit for the damages wrought?

The objection founded in conspiracy law, we conclude, is sustained by neither reason nor authority. Long ago,

in a case involving one alleged to have conspired with foreign diplomats immune even to criminal indictment, we reasoned and held:

> The bill of Particulars furnished by the District Attorney admits that the Japanese persons named in the indictment were "the representatives, officers and agents of the Imperial Japanese Government." The motion to quash, which was overruled on demurrer, states that one was a Commander in the Japanese navy, and the other registered in our Department of State as Assistant Naval Attache of the Japanese Government. We may assume it proven that they were such. It is thereupon argued that they have diplomatic immunity from prosecution, and could not be co-conspirators with Farnsworth so as to constitute a criminal conspiracy. . . . If such persons in the United States join with a citizen of the United States in a conspiracy to commit a crime, though it be conceded that the foreign diplomat would not be indicted in the District Court, or even that he could not be, his immunity will not excuse the local citizen. At least two persons must join in an unlawful enterprise to constitute it a conspiracy. The statute expressly so says. But both need not be prosecuted, or prosecutable. One may die, may escape, or obtain a pardon; but the other remains guilty. It may be that the offense of giving national defense information to a foreign government denounced by Section 32 could not well be committed by representatives of that government who receive it; but even so a person who cannot commit a substantive offense may guiltily conspire with another who can commit it that he do so. *United States v. Rabinowich,* 238 U.S. 78, 35 S.Ct. 682, 59 L.Ed. 1211; *United States v. Holte,* 236 U.S. 140, 35 S.Ct. 271, 59 L.Ed. 504, L.R.A. 1915D, 281; *O'Leary v. United States,* 7 Cir., 56 F.2d 515; *Curtis v. United States,* 10 Cir., 67 F.

> 2d 943. The rule that the acquittal of all save one alleged conspirators results in the acquittal of all applies to acquittals on the merits. The reason of it is that such judgments prove that there was in fact no criminal agreement among two or more persons. On the trial of a conspirator there is no technical rule that others must be concurrently or precedently convicted. Nor will personal defenses of the other conspirators not amounting to a total incapacity to commit crime be a defense to him.

Farnsworth v. Zerbst, 98 F.2d 541, 544 (5th Cir. 1938). Unable to improve upon this reasoning or upon the language expressing it, we reaffirm it. Logically, Judge Carrillo's immunity from the damages remedy did not in any manner effect his capacity to conspire, as might have, say, an established condition of insanity. On what is presently before us, he was as able to enter into an agreement, legal or illegal, as any other adult citizen. The same is true of our hypothetical judge whom, since he is our creature, we endow with normal capacities. The objection sought to be grounded in conspiracy law does not bear analysis.

Nor do logic or authority support the objection that, since the sole "state actor" is immune from a damage suit, state action is somehow absent. Indeed, the proposition is so wide of the mark that merely to state it is to reveal its want of logic. In assaying for state action, the question is not at all whether the agent of the state who acts is subject to any particular sanction. Rather, it is whether he has exercised the power of the state in the premises. Both Judge Carrillo and our hypothetical magistrate entered orders deriving their force from state sovereignty. These were state actions, and their character as such is

not impeached in any way by the circumstance that their authors could not be mulcted in damages because of them.

[9] The independence of the issue of state action from the pursuit of specific remedies against state officials is illustrated by *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). In that case, the plaintiff, Sandra Adickes, brought suit against *S. H. Kress & Co.* to recover damages under 42 U.S.C. § 1983 for an alleged violation of her constitutional rights under the equal protection clause of the fourteenth amendment. One count of Ms. Adickes' complaint alleged that while serving as a volunteer teacher at a Freedom School for black children in Hattiesburg, Mississippi, she went with six of her students to the Kress store to eat lunch. According to the complaint, after the group sat down at a booth a policeman entered the store and " 'observed [Ms. Adickes] in the company of the Negro students.' " 398 U.S. at 149, 90 S.Ct. at 1604. A waitress then took the orders of the Negro students but refused to serve Adickes because she was a white person "in the company of Negroes." *Id.* Following this refusal of service, Adickes and her students allegedly left the Kress store, and when they reached the sidewalk, the policeman who had previously observed her inside the lunchroom arrested Adickes on what she asserted was a groundless charge of vagrancy. 398 U.S. at 149, 90 S.Ct. 1598. Adickes brought suit only against Kress, a private party, and not against the state or its officials, charging in this count that a Kress employee and a Hattiesburg policeman "reached an understanding to deny [her] service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes." 398 U.S. at 152, 90 S.Ct. at 1605. The Court was plainly untroubled by the

fact that "[t]he involvement of a state official in such a conspiracy plainly provid[ed] the state action essential. . . ." *Id.* But in addition, the Court, discussing the elements of a section 1983 conspiracy between public official and private persons, made clear that a party who was not an official of the state could be liable for damages under section 1983 by virtue of the fact that the private person *himself* acts under color of state law and fulfills the state action requirement of section 1983 actions so long as he is involved in a conspiracy with a state official. The Court declared that

> a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983. "Private persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents . . . ."

398 U.S. at 152, 90 S.Ct. at 1605-1606, *quoting United States v. Price,* 383 U.S. 787, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966) (citation omitted). By the same reasoning, coconspirators act under color of law and can be sued for damages in a section 1983 action when they involve a judge in their plot, regardless of whether the judge can be brought to justice for his part in the scheme. It follows that the unavailability of damages as a remedy against either Judge Carrillo or our hypothetical judge has no effect on whether the judges' actions were those of the state such that their coconspirators, too, acted under color of state law when they involved the judge in their conspiracy. The state action requirement for a

section 1983 suit is met, judicial immunity notwithstanding.

The doctrine of a derivative immunity for private persons who conspire with judges can thus be seen to lack foundation in either reason or authority. Accordingly, we abolish it and, to the extent that our cases cited at note 2 above espoused it, we overrule them. We recognize that in doing so we cast away a tool for discouraging possible mischievous lawsuits that, by intention or effect, harass judges for performing their offices. But this tool, like a hot flatiron, is too awkward for service as a cautery and works too much damage to surrounding structures for the small benefit it confers.

Insofar as the judgment below dismissed the claims against Duval County Ranch Co., Inc. and Messrs. Manges, Dennis and Martens, it is reversed, and these claims are remanded for further proceedings. Insofar as it dismisses the claims for damages against Judge O. P. Carrillo, it must be affirmed.

AFFIRMED in part and in part REVERSED.

COLEMAN and AINSWORTH, Circuit Judges, with whom RONEY and HILL, Circuit Judges, join dissenting:

Judges Wisdom, Godbold, and Tjoflat decided this case correctly at the panel level, 588 F.2d 124, 5 Cir. That decision should not now be overturned by the en banc court.[1]

The majority concedes, as it must, that judges are *absolutely* immune to civil damage suits for judicial acts done within their jurisdiction, *Bradley v. Fisher,* 1872, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646. The same absolute immunity applies to state prosecutors, *Imbler v. Pachtman,* 1976, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128.[2]

. . *Bradley v. Fisher, supra,* was a case, in overheated times, growing out of the unsuccessful prosecution of John H. Suratt for complicity in the murder of President Lincoln. We feel that the en banc majority has failed

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1. Nothing is to be gained by commenting at any great length on the highly strained manner by which our Court has taken this case under its *en banc* wing. The extended apologia at the outset of the majority opinion is comment enough. Suffice it to say, nobody appeared here for any state judge. The sword is now suspended over their heads in a case in which only some, but not all, *private* parties appeared by counsel. If a criminal defendant were to be given this kind of short shrift we undoubtedly would be shrieking that it was "fundamentally unfair"—devoid of the most elementary "due process".

This case ought to be remanded to the docket. Briefs and oral argument ought to be had on behalf of state judges and state prosecutors. *They are the real defendants in this case.*

2. *See, also,* the extensive array of cases cited in the panel opinion, 588 F.2d at 126, footnote 2.

Since *Imbler* held that state prosecutors have the same absolute immunity as judges, the en banc majority necessarily includes them in the net now being devised for judges.

to give full recognition to the teachings of that case. It was there held:

> "[The Judge] cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, *with out apprehension of personal consequences to himself* (emphasis added). Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the posession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful."

80 U.S. at 347.

The High Court not only said that the judges are immune to suits for pecuniary damages. The Court said that a judge shall be free to act "without apprehension of personal consequences". Being dragged through a civil suit among private individuals in which the judge's integrity is the indispensable jurisdictional issue cannot be anything but a personal consequence which the *en banc* majority now allows in contravention to *Bradley*.

Bradley went on to hold that the purity of judicial motives, even judicial corruption, cannot be the subject of judicial inquiry in a civil suit. It noted that:

> "If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the

> acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action."

80 U.S. at 348.

Bradley was recently reaffirmed in *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). It was argued in *Stump* that the judge should be denied immunity "because of the tragic consequences of [his] actions", 98 S.Ct. at 1108, but the Supreme Court reaffirmed that a judicial officer should be free of " 'apprehension of personal consequences to himself' " [citing *Bradley*], 98 S.Ct. at 1108.

We believe that judges may not be attacked collaterally in a damage suit among private parties where, as in a § 1983 case, jurisdiction depends on the establishment by a preponderance of the evidence that the judge acting within his jurisdiction nevertheless acted conspiratorily and corruptly.

There is no merit in the argument that in the case presently before us the judge is not a party defendant. The functions of his office and his performance therein are indispensably necessary to the continuation of the action. To say that he is not being sued is a pretense.

What the en banc Court is doing here is to abrogate state judicial or prosecutorial immunity if the plaintiffs allege a conspiracy under a § 1983 cause of action.

Although they cannot be sued directly, this en banc opinion allows state judges and state prosecutors to be sued *indirectly,* seriously breaching absolute judicial immunity. We must dissent.

The destruction of many a massive dike began with a very small leak. Jurisprudentially, this is just such a case, and the newly announced doctrine has been reached without precedent to support it; indeed, the majority summarily overrules prior precedents—"*We can and we do*" (emphasis added). By this indirection the Court now plants a land mine under every state judge and prosecutor in this Circuit, to be detonated at the whim and caprice of any unhappy state court litigant. And it makes no difference, apparently, that such litigants in meritorious cases have available state remedies against the private defendants.

The majority asserts [slip opinion p. 545] that this unprecedented step is mandated by the need to deal with "unredressed wrong", but that protestation cannot stand examination. There is not the slightest hint that *damage suit* redress was unavailable under Texas law against the private defendants.[3]

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3. The panel opinion pointed out, 588 F.2d at 125, that the Texas Court of Civil Appeals dissolved the allegedly corrupt injunction involved in this case; moreover, the judge who issued it has been removed from the bench. We would be surprised to learn that the jurisprudence of Texas is so deficient that the damages available under 42 U.S.C. § 1983 are unavailable under Texas law against the private individuals guilty of the kind of conspiracy alleged here.

It has been said, however, that rights guaranteed by Texas law are "no good in Duval County". Conditions in *one county* in six states cannot possibly justify abrogation of the absolute immunity of hundreds of judges and prosecutors who have absolutely nothing to do with what goes on in Duval. Verily, the hair on the tail is now to be allowed to wag the dog.

The majority concedes [slip opinion p. 545] that "[e]very trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge . . . acted in knowing concert to deny federal rights protected by § 1983".

That is exactly the fatal defect in this majority decision, and it should have been recognized that state prosecutors are also being shoved off the ledge.

In seeking, quite lamely we think, to minimize the impact of what is being done here, the majority opines that the obligation of a judge to testify in such cases "is comparatively insignificant", as if this were the only danger to which judges and prosecutors are now about to be subjected. But this is a very small portion of the iceberg.

If there is anything a judge ought to prize and that the public demands, it is his *judicial integrity*. It is commonly accepted that a judge must not only avoid evil but he must avoid even the appearance of it. Under this decision any state judge or any state prosecutor may have that integrity besmeared by any individual who has lost a case and who knows how to *charge* enough misconduct to withstand a motion to dismiss, however without merit the complaint may be.

The Supreme Court has consistently recognized the existence of an interest in reputation which cannot be infringed without the invocation of due process requirements. The Court articulated this principle most clearly in *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971), by asserting that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to

him, notice and an opportunity to be heard are essential". *Id.* at 437, 91 S.Ct. at 510. The High Court reaffirmed this concept in *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), requiring a hearing for students suspended from high school. The Court noted that the charges of misconduct upon which the suspensions were based "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment". *Id.* at 575, 95 S.Ct. at 736. *See, also, Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The Court in rejecting the claim for a due process hearing noted that this would be a "different case" if the State had made charges against the plaintiff which "might seriously damage his standing and association in his community".

In *Codd v. Velger,* 429 U.S. 624, 97 S.Ct. 882, 51 L.Ed.2d 92 (1977), the Court recognized that an allegation that the plaintiff, a trainee policeman, had attempted to commit suicide, if false, would place such a stigma upon the plaintiff's reputation that due process procedures would be required under the Fourteenth Amendment.

In suits such as that now allowed by the majority for the first time in the history of this Court, how can the judge or the prosecutor defend himself? He is not a party defendant, so he is not entitled to trial participation as a party litigant. He might arrange active participation by surrendering the cornerstone of his judicial independence in a motion to intervene as a defendant. If he goes to that extreme (which if consistently followed would greatly harm the judiciary as an institution) he

most likely would have to employ counsel, presumably at his own expense, suffering the consequent pecuniary punishment, if nothing else.

If the judge or the prosecutor does not become a party defendant, how can he guarantee himself the right to testify in behalf of his vindication? Who will call him as a witness? Who will examine and cross-examine witnesses? Could he ask for jury instructions? Would he be allowed to make an argument to the jury? Must the judge stand helpless while the most vital need and the most precious possession of the judiciary is damaged, possibly destroyed, by *private parties* to a *private* damage suit *which could not have been brought directly against him?*

Does our jurisprudence contemplate that in those cases where a judge has absolute immunity to a suit for money damages he may nevertheless have his judicial character and reputation irreparably splotched by a verdict from six jurors in a suit to which he could not have been made a party? We do not think so.

Although the majority *attempts* it, are judges to be equated with agents of foreign powers? Are judges to be equated with policemen who have only qualified immunity?

Neither do we consider the necessity for a state judge or prosecutor to appear as a witness in a private suit for money damages to be as inconsequential as the majority appraises it. Cases have a way of being delayed for a long time, continued from time to time. The state judge or prosecutor may have an important case which demands speedy attention. At the beck and call of private litigants he is immobilized, or, at least, forced into delays which may hamper justice.

THIS OPINION VIOLATES FEDERAL PRINCIPLES

Although the considerations already stated should be enough to affirm the dismissal of this complaint, there is a far more serious reason for not invading the absolute judicial immunity of state judges and state prosecutors.

Regardless of how diligently we may try to avoid the issue, the cold fact is that this decision makes state judges and state prosecutors *personally* answerable in federal court to private litigants for their state judicial or prosecutorial acts.

Of course, the legal correctness of such judicial actions may be reviewed as to federal constitutional questions in a number of ways, but the point is that in those instances the *legal merits* of the action are being reviewed, a matter of no *personal* consequence to the judge or prosecutor as to how the case may ultimately turn out.

MAJORITY RATIONALE CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS

Not only is the en banc opinion of this court harmful to basic policies underlying judicial immunity and insensitive to the delicate balance between state and federal courts, it is also contrary to what has been the clear weight of authority in the Federal Courts of Appeals. With the exception of the First Circuit,[4] all Circuit Courts that have explicitly considered the question have concluded that a private defendant cannot be held liable under

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4. *Slotnick v. Staviskey*, 1 Cir. 1977, 560 F.2d 31, *cert. denied*, 434 U.S. 1077, 98 S.Ct. 1268, 55 L.Ed.2d 783 (1978); *Kermit Const. Corp. v. Banco Credito Y Ahorro Ponceno*, 1 Cir., 1976, 547 F.2d 1.

§ 1983 for conspiring with a state actor if the state actor himself is immune.[5]

The cases enunciating this rule begin with the Ninth Circuit's oft-quoted decision in *Haldane v. Chagnon,* 9 Cir., 1965, 345 F.2d 601. In *Haldane,* plaintiff charged that two judges of the Superior Court of California, the bailiff of one of the judges, and two licensed attorneys were involved in a broad-based conspiracy to deny him various constitutional rights. The Ninth Circuit reaffirmed the lower court's order of dismissal against the judges and the bailiff on the ground of judicial immunity. It then affirmed the dismissal as to the attorneys with the following language:

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5. See, e. g., *Hazo v. Geltz,* 3 Cir. 1976, 537 F.2d 747; *Guedry v. Ford,* 5 Cir. 1970, 431 F.2d 660; *Kurz v. Michigan,* 6 Cir., 1977, 548 F.2d 172; *Hansen v. Ahlgrimm,* 7 Cir., 1975, 520 F.2d 768; *Haldane v. Chagnon,* 9 Cir., 1965, 345 F.2d 601.

The position of the Seventh Circuit is presently somewhat unclear, following the highly fractionated en banc opinion in *Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261, 1979. The per curiam opinion in that case affirmed the district court's dismissal of a § 1983 conspiracy against private defendants after the state actor (a judge) was held to be immune from suit. Four concurring opinions were filed along with the per curiam order. Two judges wrote that the question of whether a § 1983 suit may be brought when the state actor is immune was not properly before the court. *Id.* (Pell, J., and Bauer, J., concurring). Three judges, on slightly divergent rationales, would allow § 1983 suits even when the state actor is immune, provided the plaintiff meets the burden of a particularized pleading requirement. *Id.* (Fairchild, C. J., concurring), (Sprecher, J., concurring) (Tone, J., concurring).

Two cases from the Second and Third Circuits contain language broad enough to negate the rule stated in the text; i. e., that a private actor cannot be held liable for conspiracy under § 1983 if the state actor is immune. *Jennings v. Shuman,* 3 Cir., 1977, 567 F.2d 1213; *Fine v. New York,* 2 Cir., 1975, 529 F.2d 70. However, these cases, which state generally that a private citizen can be liable under § 1983 if he conspires with a state official, never explicitly considered the question of whether the private actor is liable when the state actor is immune from suit.

> With the elimination of the defendant judges and bailiff from the case, claims against the defendant attorneys under the Civil Rights Act cannot be stated. The attorneys were not State officers, and they did not act *in conspiracy with a State officer against whom appellant could state a valid claim.* It follows that they did not, and could not, commit the alleged wrongful acts "under color of state law or authority"; hence, they are not subject to liability under the Civil Rights Act." *Id.* at 604, 05. (Emphasis added).

The Ninth Circuit has adhered to this rule in the recent cases of *Sykes v. Department of Motor Vehicles,* 9 Cir., 1974, 497 F.2d 197; and *Briley v. California,* 9 Cir., 1977, 564 F.2d 849.[6]

In addition to the Ninth Circuit, the same rule has been adopted by the Third,[7] Sixth, and Seventh Circuits.[8] *See,*

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6. Note that Judge Choy's opinion in *Briley* refers to the holding in *Haldane* as "dicta." 564 F.2d at 858 n. 10. Classifying the *Haldane* rule as "dicta", however, is dubious at best. The holding that private parties cannot be liable under § 1983 when the state actor is immune from suit was necessary to the Ninth Circuit's affirmation of the lower court's disposition in *Haldane* and that ruling is certainly not "dicta". *Haldane v. Chagnon,* 9 Cir., 1965, 345 F.2d 601.

7. The recent case of *Jennings v. Shuman,* 3 Cir., 1977, 567 F.2d 1213, has been cited for the proposition that the Third Circuit has abandoned the majority rule. However, a careful reading of that case demonstrates that the court was not presented with the question of whether a private defendant can be held liable under § 1983 when the state actor is immune from suit. *See Hazo v. Geltz,* 3 Cir., 1976, 537 F.2d 747; *Waits v. McGowan,* 3 Cir., 1975, 516 F.2d 203.

8. As noted in footnote 5, the current position of the Seventh Circuit is somewhat uncertain due to the recent en banc opinion in *Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261, 1979. The per curiam opinion in that case affirmed the lower court's dismissal of § 1983 conspiracy charges against the private defendants after the state was held immune from suit. Whether this result was reached based on the Seventh Circuit's earlier adoption of the majority rule, *Hansen v. Ahlgrimm,* 7 Cir., 1975, 520 F.2d 768; *French v. Corrigan,* 7 Cir.,

e. g., Hazo v. Geltz, 3 Cir., 1976, 537 F.2d 747; *Waits v. McGowan,* 3 Cir., 1975, 516 F.2d 203; *Kurz v. Michigan,* 6 Cir. 1977, 548 F.2d 172; *Hansen v. Ahlgrimm,* 7 Cir., 1975, 520 F.2d 768; *French v. Corrigan,* 7 Cir., 1970, 432 F.2d 1211; *Brown v. Dunne,* 7 Cir., 1969, 409 F.2d 341. *See also Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261, 1979.

In the Fifth Circuit, the above rule has been firmly established since the 1970 case of *Guedry v. Ford,* 5 Cir., 1970, 431 F.2d 660. After *Guedry,* the rule has been followed in *Slavin v. Curry,* 5 Cir., 1978, 574 F.2d 1256, modified on other grounds, 583 F.2d 779; *Perez v. Borchers,* 5 Cir., 1978, 567 F.2d 285; *Humble v. Foreman,* 5 Cir., 1977, 563 F.2d 780; and *Hill v. McClellan,* 5 Cir., 1974, 490 F.2d 859. A rule of law so firmly established should not be lightly overturned.

Detractors of the rule argue that, however, firmly established, there was never an adequate rationale to sustain it, and in any event it cannot withstand rigorous analysis. We refute such contentions.

The policy rationale supporting the rule should be self-evident to anyone familiar with the burgeoning number of § 1983 suits and aware of the impact of this phenomenon on our federal judicial system. Today's opinion alters dramatically the relationship between state and federal courts. Henceforth, anyone dissatisfied with the result of litigation in state court can allege a "con-

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1970, 432 F.2d 1211, or upon a new rule that the conspiracy was not alleged with sufficient particularity is difficult to ascertain. *See Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261, 1979 (Fairchild, C. J., concurring), (Pell, J., concurring), (Sprecher, J., concurring), (Tone, J., concurring).

spiracy" sufficient to obtain federal court review of his claim.[9] As one court put it:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary, to obtain a review and a retrial of the State Court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise and recite in haec verba the language of the Civil Rights Act does not give a right of review in the Federal Courts. To uphold the claim here advanced upon such conclusory allegations 'would open the door wide to every aggrieved litigant in a state court proceedings, and set the federal courts up as an arbiter of the correctness of every state decision.'
>
> "This case demonstrates forcibly the wisdom of the public policy which grants immunity to judicial and other officials for acts performed in the discharge of their duties. If in circumstances such as this defendants may be made to answer for their determinations, not only would the independence of the judiciary be undermined, but a ready means would be at hand to paralyze the entire judicial system."

French v. Corrigan, 7 Cir., 1970, 432 F.2d 1211, 1213-14 (quoting *Morgan v. Sylvester,* D.C., 125 F.Supp. 380, *aff'd,* 2 Cir., 220 F.2d 758, *cert. den.,* 350 U.S. 867, 76 S.Ct. 112, 100 L.Ed. 768).

Judge Sprecher, in his concurring opinion in *Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261 at 267, 1979, sets

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9. As noted by the majority: "Every trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge (or judges) and whatever other participants the pleader's fancy may light upon acted in knowing concert to deny federal rights protected by section 1983." Majority Opinion slip opinion at p. 545.

forth quite clearly the policy considerations supporting the rule now abandoned by this court:

> The first is that frivolous civil rights actions should be discouraged. Second, the federal courts, under the guise of civil rights, should not monitor and furnish a remedy for each losing party in every state court proceeding, particularly when the state merely furnishes the forum, has no interest in the outcome, and the state judge does no more than preside over a case presented to him by performing discretionary acts, judicial functions and the normal duties of his office. Third, private persons who are victims of, or witnesses to, a crime should not be discouraged from reporting the crime or from following the advice of a prosecuting attorney as to whether to lodge a formal complaint against, or to appear as a witness against, the perpetrator. Similarly, in civil matters, private persons should not be discouraged from or penalized for seeking the aid or judicial approval of a court before embarking upon activities of ambiguous legality. This is particularly important since it can be presumed that if the action is unconstitutional the judge will be more likely to prevent it than the individual engaging in self-help will be to refrain from engaging in it. Fourth, permitting conspiracies to be claimed which include immune judges may expose a judge to the time-consuming effort and chilling effect of submission to discovery and the appearance as a witness. Finally, if a judge condones a particular course of conduct, it seems manifestly unfair that the judicial expert should be immunized from attack but that the untutored lay person should be vulnerable to costly attack for participating in the same activity as the judge.[10]

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10. Judge Sprecher also lists policy considerations militating for the rule adopted en banc by a majority of this court:

> There are of course other policy arguments favoring recovery from private co-conspirators. If a judge should, for example,

Today's majority opinion spends little time with such policy considerations. The opinion notes that "[m]ischievous damage suits of this sort license the ill-disposed to require judges to appear and testify," but concludes that any such burden will be "comparatively insignificant." Majority Opinion slip opinion at p. 545. Once having given this slight nod toward the policy problems inherent in its holding, the majority spends the rest of its time demonstrating that its decision is analytically palatable.

We doubt that the practical impact of this decision properly may be termed as "comparatively insignificant." Today's decision affords an opportunity for state prisoners possessing sufficient pen and ink to allege a conspiracy between a judge, a prosecutor, and "whatever other participants the pleader's fancy may light upon." Majority Opinion slip opinion at p. 545. If the petitioner can drum up sufficient allegations to withstand a motion to dismiss, he can now effectively hail a state judge or prosecutor

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accept a bribe for performing a judicial act which deprives a person of constitutional rights or should reach an express understanding with another person to violate the constitutional rights of a third person, a remedy should exist against the briber or conspirator regardless of the judge's immunity. It would be illogical to dispense immunity to state actors and then extend that immunity to private persons conspiring with them, narrowing civil rights relief to direct state action only. Civil rights cases should be disposed of by case-to-case attention and not swept away by broad *per se* immunity. If in any particular case competing policy considerations exist, the federal court should be able to balance all such considerations in reaching its result. *Sparkman v. McFarlin*, 7 Cir., 601 F.2d 261 at 267, 1979.

Judge Sprecher, for his part, favored abolishing the immunity rule. In its place, he suggested a rule requiring particularized pleading of § 1983 conspiracy claims. This solution, which seeks to avoid a barrage of conspiracy actions, creates difficulties of its own—the particularized pleading requirement runs contrary to the general federal philosophy of notice pleading.

before federal court in the course of suing "private" parties.

The history of cases in our own Circuit should be instructive as to the probable impact of the majority's decision on the flow of prisoner appeals to this court. Of the five cases in this Circuit cited earlier as applying the immunity rule, four were brought by incarcerated or indicted plaintiffs. *Slavin v. Curry,* 5 Cir., 1978, 754 F.2d 1256, modified on other grounds 583 F.2d 779; *Perez v. Borchers,* 5 Cir., 1978, 567 F.2d 285, *Humble v. Foreman,* 5 Cir., 1977, 563 F.2d 780; *Hill v. McClellan,* 5 Cir., 1974, 490 F.2d 859.

Apparently the majority is, in fact, aware of the potential its opinion has for opening the door to frivolous conspiracy claims. Somewhat off-handedly the opinion states that "mere conclusory allegations of conspiracy cannot, absent reference to material facts, survive a motion to dismiss." Majority Opinion slip opinion at p. 543, at p. 5. Thus, the court may be imposing a strict pleading requirement upon § 1983 conspiracy actions, in order to avoid a barrage of groundless claims. Indeed, at least one judge in the Seventh Circuit has suggested that abolishing the immunity rule and replacing it with a "particularized pleading" rule is the proper solution to the present quandary.[11]

A particularized pleading requirement, however, is at odds with a basic policy underlying federal civil procedure —notice pleading. See Rule 8, Federal Rules of Civil Procedure.

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11. *Sparkman v. McFarlin,* 7 Cir., 601 F.2d 261, 1979 (Sprecher, J., concurring).

Furthermore, erecting a pleading barrier between the courtroom and ungrounded lawsuits is likely to be an unsatisfactory means of avoiding frivolous litigation, since persons disposed to bring such litigation would probably have little difficulty explicating their alleged grievances with particularity.

The majority is seemingly unaware of the inroads it has made into the doctrine of judicial immunity, or of the impact its decision could have on the respective roles of state and federal courts. "All authorities," the majority states, "recognized that when a judge acts in a 'clear absence of all jurisdiction' he is not protected. But any broader or less explicit inroad upon the robe's immunity in an attempt to reach its wearer would invite recurring attempts at enlargement, ruinous in terms of judicial time and funds expended to defend—even successfully—against them." Majority opinion slip opinion at p. 545.

In our view it is unwise to encroach upon the robe's immunity. The court now abandons a rule of law that has served this and other Circuits well for over a decade, and replaces it with a formulation corrosive to the doctrine of judicial immunity, harmful to the proper functioning of our federal system, and fraught with the possibility of providing the means for frivolous litigation.

We suggest that this decision will not be the last word on this subject and we respectfully dissent.

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

October Term, 19

No. 77-1249

D. C. DOCKET NO. CA-76-C-2

SIDNEY A. SPARKS, R. L. LYND, d/b/a
SIDNEY A. SPARKS, TRUSTEE,
Plaintiffs-Appellants,

versus

DUVAL COUNTY RANCH COMPANY,
INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH, Circuit Judges.*

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* Judges Johnson, Garza, Henderson, Reavley, Politz, Hatchett, Anderson and Randall did not participate in the consideration of or decision in this case. The case was taken under submission by the Court en banc on June 5, 1979.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that appellants recover their costs on appeal from the appellees, except appellee O. P. Carrillo, who shall recover his costs from the appellants.

October 22, 1979

Coleman and Ainsworth, Circuit Judges, with whom Roney, Circuit Judge, joins, dissenting.

ISSUED AS MANDATE:

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 77-1249

SIDNEY A. SPARKS, R. L. LYND, d/b/a
SIDNEY A. SPARKS, TRUSTEE,
Plaintiffs-Appellants,

versus

DUVAL COUNTY RANCH COMPANY,
INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
For The Southern District of Texas

ON PETITION FOR REHEARING

(December 14, 1979)

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH, Circuit Judges.*

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* Judges Frank M. Johnson, Jr., Garza, Henderson, Reavley, Politz, Hatchett, Anderson, Randall, Sam D. Johnson, and Tate did not participate in the consideration of or decision in this case. The case was taken under submission by the Court en banc on June 5, 1979.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Orville E. Dennis in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

THOMAS GIBBS GEE
United States Circuit Judge

Supreme Court, U.S.
FILED
MAY 8 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1186

ORVILLE E. DENNIS,
Petitioner

v.

SIDNEY SPARKS and R. L. LYND,
d/b/a SIDNEY SPARKS, TRUSTEE,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

Petition for Certiorari Filed February 1, 1980

Certiorari Granted March 24, 1980

TABLE OF CONTENTS

		Page
1.	Relevant Docket Entries of the United States District Court for the Southern District of Texas	1
2.	Relevant Docket Entries of the United States Court of Appeals for the Fifth Circuit	3
3.	Relevant Respondents' Pleadings	6
	(a) Plaintiff's First Amended Complaint, filed October 26, 1976, in the United States District Court for the Southern District of Texas	6
4.	Relevant Petitioner's Pleadings	26
	(a) Second Amended Motions to Dismiss, First Amended Original Answer and First Amended Cross-Claim of Defendant Orville E. Dennis filed November 1, 1976 in the U. S. District Court for the Southern District of Texas	26
5.	Orders, Opinions and Judgments Printed in Appendix in Petition for Writ of Certiorari Filed February 1, 1980	33
6.	Certificate of Service	35

RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

1/6/76	Plaintiffs' Original Complaint filed. Summons issued and handed to U.S. Marshal.
1/27/76	Answer of Defendant O. P. Carrillo filed.
1/28/76	Motions to dismiss, Original Answer and Cross-Claim of Defendant Orville E. Dennis.
2/2/76	Defendant O. P. Carrillo's Motion to Disqualify Attorney Garland F. Smith filed.
2/2/76	Answer of Defendants Duval County Ranch Company, Inc. and Clinton Manges filed.
2/5/76	Motion of Defendant Clarence Martens to adopt Pleadings, filed.
2/9/76	Answer of Garland F. Smith to Motion of Defendant O. P. Carrillo to Disqualify Attorney, filed.
2/9/76	Plaintiff's Answer to the Motion of Defendant Orville E. Dennis to dismiss, filed.
2/23/76	First Amended Motion to Dismiss of Defendant Duval County Ranch Co., Inc., and Clinton Manges, filed.
2/25/76	Defendant Dennis First Amended Motions to Dismiss, filed.
4/8/76	Plaintiff's Motion for Leave to amend complaint, filed.
4/15/76	Defendant Manges Objection to request for Amendment & Motion to dismiss filed.

4/27/76	Defendant Dennis's objection to Plaintiff's Motion for Leave to amend complaint, filed.
5/3/76	Clarence Martens' Objection to Plaintiff's Motion for Leave to amend complaint, filed.
9/3/76	PRE-TRIAL CONFERENCE set for October 22, 1976 at 11:a.m.
10/22/76	PRE-TRIAL CONF. HELD—inter alia, Motion to dismiss is under advisement and Court granted Plaintiff leave amend complaint.
10/26/76	Plaintiffs' First Amended Complaint, filed.
10/29/76	Defendant's Answer to Plaintiff's First Amended Petition filed.
11/1/76	Defendant's Amended Motions to Dismiss First Amended Original Answer and First Amended Cross-Claim (Deft. Orville Dennis).
12/17/76	ORDER, filed (Motion to Dismiss is granted as to all defendants).
12/20/76	JUDGMENT, filed (Case is dismissed as to ORDER entered on 12/17/76).
1/17/77	Plaintiffs' Notice of Appeal, filed (due 2/21/77).
1/25/77	Cost Bond on appeal (cash deposit), filed.
2/1/77	Plaintiffs' Designation of Contents of record, filed.
2/14/77	Appellee, Orville E. Dennis' Designation of Instruments, filed.
2/18/77	Record mailed to Ct. of Appeals. /ns

RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2/2/77	Dup. Notice of Appeal and Clerk's Statement of Docket Entries
2/24/77	Record on Appeals (1 vol.)
4/5/77	Appendix (M)
4/5/77	Brief for Appellants (M)
4/28/77	Brief for Appellee (M) O. P. Carrillo
5/9/77	Brief for Appellee (M) Dennis
5/13/77	Letter 5/9/77 appellees', Duval County Ranch and Clinton Manges, adopting briefs of Carrillo and Dennis
5/17/77	Filing letter dated 5/13/77 advising that Clarence Martens adopts briefs of O. P. Carrillo and Orville E. Dennis
4/5/78	Filing Letter dated 4/3/78 of appellee O. P. Carrillo calling attention of recent U. S. Supreme Court decision
5/22/78	Reply Brief for Appellant
9/29/78	Filing motion of appellee, Clinton Manges, to waive oral argument and to adopt argument of appellees, O. P. Carrillo and Orville E. Dennis
10/4/78	Filing Order GRANTING motion of appellee, Clarence Martens, to waive oral argument and adopt argument of other defendants-appellees (JCG)

10/5/78	Filing Order GRANTING motion of appellee, Clinton Manges, to waive oral argument and adopt argument of appellees, O. P. Carrillo and Orville E. Dennis (JCG)
10/6/78	Filing Amended motion of Duval County Ranch to waive oral argument and adopt oral argument of other defendants
10/9/78	Filing Order GRANTING amended motion of appellee, Duval County Ranch Company, to waive oral argument and to adopt the argument of other defendants (JCG)
10/18/78	Post Submission Brief for Appellee (J) for Carrillo
10/26/78	Flg. Reply of Appellants to Post Submission Brief of O. P. Carrillo (M) (J).
10/27/78	Flg. Appellant's motion to file reply of appellants to post submission brief of O. P. Carrillo (GRANTED—BWS)
1/17/79	Opinion Rendered, affirmed, P.C.
2/2/79	Bill of Costs
3/9/79	Filing Order on the Court's own motion granting that the case be heard en banc with oral argument.
3/9/79	REPORTED REOPENED TO A.O.
4/4/79	Supplemental Brief for Appellants on Rehearing en banc
5/15/79	Filing Letter from counsel for Duval County Ranch Co., Inc. adopting brief of appellees and adopting oral argument (SEND TO PANEL) (CE)

5/7/79	Supplemental Brief for Appellee (Dennis) on rehearing en banc
5/29/79	Reply Brief for Appellants on Rehearing en banc (J)
6/5/79	MINUTE ENTRY: THIS CASE WAS HEARD EN BANC TODAY BEFORE: HONS. BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE, and KRAVITCH. ARGUED BY GARLAND F. SMITH FOR APPELLANTS. ARGUED BY FINLEY L. EDMONDS FOR APPELLEES. SEE LETTERS OF 3-22-79, 5-15-79, & 5-24-79 for additional information.
11/5/79	Petition for Rehearing (M)(J)—Appellee Orville E. Dennis—Reg.
11/5/79	Bill of Costs
12/10/79	Amicus Curiae (Judge Coker) (Granted 12/14/79)
12/14/79	Order Denying Rehearing—Dennis
12/20/79	Stay of Mandate (Granted 2/2/80)
2/8/80	Notice of Flg. of Cert. Pet. on 2/1/80—Dennis
3/17/80	Notice of filing Cert.
3/28/80	Order of S.C., Petition for Certiorari Granted 3/24/80
3/31/80	Order of S.C., Petition for Certiorari Denied 3/24/80 (79-1239 only)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION
CORPUS CHRISTI, TEXAS

CIVIL ACTION NO. 76-C-2

SIDNEY A. SPARKS, R. L. LYND, d/b/a
SIDNEY A. SPARKS, TRUSTEE, Plaintiffs

VS.

DUVAL COUNTY RANCH COMPANY, INC.
CLINTON MANGES, CLARENCE MARTENS,
ORVILLE E. DENNIS and O. P. CARRILLO,
Defendants

PLAINTIFFS' FIRST AMENDED COMPLAINT

NOW COME SIDNEY A. SPARKS and R. L. LYND, doing business as SIDNEY A. SPARKS, Trustee, hereinafter called Plaintiffs, complaining of DUVAL COUNTY RANCH COMPANY, INC., hereinafter called DCRC; CLINTON MANGES, hereinafter called MANGES; CLARENCE MARTENS and ORVILLE E. DENNIS, hereinafter called MARTENS and DENNIS; and O. P. CARRILLO, hereinafter called CARRILLO, and would respectfully show unto this Honorable Court the following:

FIRST CAUSE OF ACTION

Jurisdiction

I.

This action arises under Section 1 of the *Civil Rights Act* of 1871, 17 Stat. 13, 42 USC 1983. The jurisdiction of this Court is grounded upon 28 USC 1343.

Venue

II.

Venue is proper in the Corpus Christi Division of the Southern District of Texas since the acts complained of occurred in such Division and since the Plaintiffs and all but one of the defendants reside in such Division of such District.

III.

This is an action for damages brought pursuant to 42 USC 1983 for deprivation of rights, privileges, and immunities secured by the Constitution and laws of the United States, such deprivation having occurred under color of State law and by virtue of a conspiracy entered into and carried out by acts, in concert, of Defendant MANGES, acting by and through the DCRC, his solely owned corporation and alter ego, and Defendants CARRILLO, DENNIS and MARTENS.

IV.

This suit arises out of the well-known corruption which has, in the past, permeated every level of local government in Duval County, Texas, including the judiciary, of which Plaintiffs ask this Court to take judicial notice. In fact, Plaintiffs verily believe and allege that this case could not have arisen in any other County in the State of Texas where the ideal of "a government of laws and not men" is more closely observed, and it is primarily because of the corruption in office prevalent in Duval County that a federal forum is appropriate in this case. As will be more specifically pled hereafter, this case concerns efforts by Defendant MANGES to

terminate a valid oil, gas and mineral lease owned and operated by these Plaintiffs, which effort was only a small part of a larger effort to terminate all oil, gas and mineral leases on land owned by DCRC. Because MANGES sought to accomplish this objective by bribery and official corruption, as will be more specifically pled hereafter, MANGES' actions acquired the character and authority of "state action", because carried out and effected under the color of law by his co-conspirator, CARRILLO.

V.

Defendant MANGES, shortly after he acquired complete stock ownership of Defendant DCRC, found the land to be burdened with numerous oil, gas and mineral leases which MANGES was desirous of terminating so that he could either lease the same upon more favorable terms, or develop the minerals himself. MANGES determined to stop production under such leases and thus cause such leases to be terminated under the provisions of the "non-production clause" common to most oil, gas and mineral leases in Texas.

VI.

To stop production under such leases, MANGES foresaw that he needed the help of a friendly Judge, one who would rule as MANGES wished him to rule. To that end, MANGES supported O. P. CARRILLO in his efforts to be elected Judge of the 229th District Court of Duval County, Texas. MANGES' support for CARRILLO, however, went further than the normal and usual political support for a candidate and, after CARRILLO had been elected, MANGES undertook to place

CARRILLO heavily in his debt, and bestowed numerous gifts, favors, and things of value upon CARRILLO, some of which were as follows:

1. Carrillo was elected Judge of the 229th District Court of Duval County, Texas in November of 1970. On or about December 10, 1970, Defendant Manges, who had acquired controlling interest in the First State Bank & Trust Company, Rio Grande City, Texas, transferred to Carrillo qualifying shares of stock in said bank and made Carrillo a Director in the Bank, and in January of each year thereafter, during the pendency of the litigation involving the Plaintiffs herein, caused Judge Carrillo to be reelected to the Board of Directors. The bank, during this period, paid Directors fees in the sum of $50.00 per month to each Director.

2. Prior to December 31, 1972, Manges, as owner of controlling interest in said First State Bank & Trust Company, Rio Grande City, Texas, as aforesaid, caused a brother of Judge Carrillo, County Commissioner Ramiro Carrillo, to be elected or appointed to the Board of Directors of said bank, and annually thereafter caused Ramiro Carrillo to be reelected to the Board of Directors.

3. On January 27, 1971, Manges purchased a new Cadillac automobile from Riata Cadillac Company in San Antonio, Texas, for the sum of $6,915.55 and delivered or caused said automobile to be delivered to Carrillo, and Carrillo did accept said automobile.

4. During 1971, Defendant Manges permitted Defendant Carrillo to graze his (Carrillo's) cattle on about 1,000 acres of ranch lands Manges owned without charge. Carrillo accepted the lease and pastured his cattle thereon.

5. Defendant Manges, because of his ownership of controlling interest in the First State Bank & Trust Com-

pany of Rio Grande City, Texas, was in a position to cause said bank to make generous loans to Defendant Carrillo, and said bank did, during the years from 1971 through 1973, make numerous loans to Defendant Carrillo, one loan secured by real estate for over $300,000.00 and other unsecured loans totalling over $38,000.00.

6. At some time in the spring of 1971, Defendants Manges and Carrillo entered into an oral grazing lease for a term of three years granting to Judge Carrillo a grazing lease for his cattle on 5,000 to 6,000 acres of ranch lands in Starr County, Texas, with no payment down and with payment to be made at the end of the term in cattle or money, at Manges' option, and subject to cancellation by Manges at Manges' option. Defendant Carrillo accepted the lease and pastured his cattle thereon.

7. Because of the above listed transactions between defendants Manges and Carrillo, the Honorable Magus P. Smith, Judge of the 93rd District Court of Hidalgo County, Texas, but sitting as Special Judge of the 229th District Court of Starr (also Duval and Jim Hogg) County, Texas, ruled on May 21, 1973 in Cause No. 3953 in said 229th District Court, styled *Clinton Manges vs. M. A. Guerra, et al,* that Defendant Judge O. P. Carrillo was disqualified as of February 1, 1971 to sit as Judge in that case wherein Defendant Manges was a party. A true copy of Judge Smith's remarks from pages 338 to 343 of the Record in said cause and the Order of May 21, 1973 are attached hereto for reference and made a part hereof for all purposes.

VII.

The intended and practical effect of MANGES' bestowing these gifts, favors, and things of value on CARRILLO and CARRILLO's acceptance of them, both at the inception of his term of office and while he was per-

forming his duties as Judge, was to bribe Judge CARRILLO and such bribery continued throughout CARRILLO's term of office until he was impeached by the House of Representatives of the State of Texas and convicted and removed from office by the Texas Senate. MANGES and CARRILLO had made a bargain. In return for MANGES' continuing to bestow gifts, favors and things of value upon CARRILLO, CARRILLO, while sitting as Judge of the 229th District Court of Duval County, Texas, would rule as MANGES wished him to rule in cases before his Court in which MANGES was a party or was interested. MANGES' giving of gifts, favors and things of value to CARRILLO and the acceptance of such gifts, favors and things of value by CARRILLO and the understanding between them in consideration of which such transactions were entered into were all acts done in furtherance of the conspiracy here complained of, and, specifically, were acts done by CARRILLO in furtherance of such conspiracy which were not done in the exercise of his judicial jurisdiction.

VIII.

MANGES, having obtained complete stock ownership of DCRC, and having made the above arrangements with CARRILLO, then undertook action to terminate the oil, gas and mineral leases on property owned by DCRC and adjoining property. Plaintiffs herein are the owners, and under the trade name of SIDNEY A. SPARKS, Trustee, the operators of a valid oil, gas and mineral lease on land owned by Exxon Corporation in Duval County, Texas, adjoining DCRC lands, such land being more specifically described as follows, to-wit:

> Eighty (80) acres out of Section 363, more particularly described as the West one-half (½) of the

Southeast one-fourth (¼) of Section 363, J. Poitevent Original Grantee, Certificate 1/371, Duval County, Texas.

Plaintiffs were producing oil under the terms of this lease on or about August 15, 1972, when MANGES, through his solely owned corporation and alter ego, DCRC, filed suit in the 229th District Court of Duval County, Texas, to enjoin production on such lease and on other leases located on lands owned by DCRC. Unlike the other Defendants in that case, however, Plaintiffs in the instant case were producing oil from a lease on land adjoining DCRC lands, a fact which seemed to make little difference either to MANGES or to Defendant CARRILLO. In stating his cause of action in the 229th District Court, MANGES, through DCRC, claimed that the production activities of these operators were polluting DCRC ranch lands and, in a shotgun petition applicable to all Defendants alike, sought to enjoin all production under the terms of all such leases and also sought money damages. CARRILLO, in accordance with MANGES' petition, and pursuant to the agreement MANGES and CARRILLO had heretofore made, entered an order on January 18, 1973 temporarily enjoining production under Plaintiff's lease and such temporary injunction remained in effect until January 23, 1975 when it was dissolved by the 9th Court of Civil Appeals of the State of Texas. Furthermore, CARRILLO was not content to enjoin only pollution, although that was the principal basis of MANGES' complaint, but framed the order so as to enjoin all production under such leases, although a more appropriate injunction could have been drawn.

IX.

CARRILLO, with respect at least to these Plaintiffs, was completely without jurisdiction to enter the order of January 18, 1973, enjoining production under Plaintiff's lease. In the first place, under Texas law, a Court is without jurisdiction to grant relief in an injunction proceeding greater than that relief prayed for by the party seeking the injunction. In the case in the 229th District Court, DCRC had prayed for an injunction prohibiting production, "on property *which Plaintiff owns* in Duval or Webb County, Texas . . .". *Duval County Ranch Company, Inc. v. The Speedman Oil Company, Inc., et al;* Cause No. 8591 in the 229th District Court of Duval County, Texas; Plaintiff's Second Amended Original Petition. (Emphasis supplied) As pointed out above, the land on which Plaintiff's lease is located is not owned by DCRC, but is owned by Exxon Corporation. Thus, CARRILLO's order enjoining production on this lease was completely void for want of jurisdiction.

In the second place, since these Plaintiffs operated a lease on lands adjacent to DCRC, Article 4644, Tex. Rev. Civ. Stat. Ann. (1940) applied and DCRC was required to allege in its Petition and prove that the party to be enjoined was unable to respond in damages before any injunction could lawfully issue. No such allegation was made and no such proof was offered; nonetheless, CARRILLO issued the injunction as prayed for by MANGES, although without legal authority to do so.

Thirdly, since CARRILLO had received the gifts, favors and things of value mentioned above from MANGES, and since he was interested in the outcome of this litigation, as well as other litigation in which MANGES

was a party or was interested, CARRILLO was absolutely disqualified to sit in this case, rendering any official action taken by him, other than ministerial acts, completely void and of no force and effect because CARRILLO, being disqualified, could not lawfully sit as Judge in this case.

X.

Defendant CARRILLO, in partiality to MANGES, and in furtherance of the conspiracy complained of, set the injunction bond required by temporary injunction at the ridiculously low figure of $5,000.00. MANGES, knowing that such a bond would be required, had previously arranged for Defendants MARTENS and DENNIS to participate in this conspiracy by signing as surteies on the injunction bond required by law. MARTENS and DENNIS, being aware of the unlawful purpose of the conspiracy and of the roles played by MANGES and CARRILLO therein, did in fact sign such injunction bond as sureties thereto, which actions in concert with MANGES, CARRILLO and DCRC did aid such conspiracy and damage Plaintiffs as hereinafter alleged.

XI.

The injunction was granted on January 18, 1973, as aforesaid, and Plaintiffs herein gave notice of appeal on that date. Such temporary injunction was dissolved by the Supreme Court of Texas on June 25, 1975, a total of 31 months later. That CARRILLO abused his discretion in the issuance of the temporary injunction has been conclusively determined by the 9th Court of Civil Appeals and the Supreme Court of Texas. However, Judge CARRILLO's actions in this case amount to substantially

more than a mere judicial error and demonstrate, in and of themselves, that Judge CARRILLO was acting in concert with MANGES to deprive Plaintiffs of their leasehold interests by unlawful acts carried on under color of State law. (See *Harry Winslow et al v. Duval County Ranch Company, Inc.*, 519 S.W.2d 217 (Tex. Civ. App. 1975 —writ ref., n.r.e.).

XII.

As a result of this conspiracy, and the unlawful acts complained of above, Plaintiffs would show that the recovery of 13,000 barrels of crude oil was lost as a result of the temporary injunction since other operators producing oil from the same reservoir were not similarly enjoined. The fair market price for production from stripper wells during the injunctive period was Thirteen and No/100 ($13.00) Dollars per barrel and, thus, Plaintiffs were damaged by the lost production in the amount of One Hundred Sixty Nine Thousand and No/100 ($169,000.00) Dollars, plus legal fees and expenses for defending against the suit in the amount of Fifteen Thousand and No/100 ($15,000.00) Dollars, for a total actual damages of One Hundred Eighty Four Thousand and No/100 ($184,000.00) Dollars.

XIII.

Plaintiffs would also show the Court that because of the fundamental nature of the wrongful acts committed by Defendants MANGES, CARRILLO, DCRC, MARTENS and DENNIS, involving not only an interference with the legally protected property rights but also a complete denial of the basic right of all litigants to try their controversies in Courts presided over by fair and impartial

Judges and the right of all citizens to be free from judicial oppression and harassment by Judges already committed to one side of the controversy because of bribery and corruption, that punative damages are appropriate in this case, and that the amount of punative damages for which Defendants MANGES, DCRC, CARRILLO, MARTENS and DENNIS are liable should be fixed at not less than double the amount of actual damages, plus such additional amount the Court may find necessary to cause these Defendants to discontinue such conduct, as well as to discourage others from so acting.

SECOND COUNT

I.

For second count, these Plaintiffs would join a State claim for damages against Defendants DCRC, MANGES, CARRILLO, MARTENS and DENNIS, and in connection therewith would reassert, with the exception of the jurisdictional statement contained in the First Count, the remaining allegations of Plaintiffs' First Count *in haec verba,* as though fully set out herein, and the allegations of the same are incorporated herein by reference for all purposes.

II.

This claim is joined with Plaintiffs' Federal claim under Rule 18 of the Federal Rules of Civil Procedure, and this Court has jurisdiciton of the same under its so-called "pendent jurisdiction" since the parties to the non-Federal claim are identical to the parties in the Federal claim and a common nucleus of operative fact is the basis for recovery in both.

III.

Plaintiffs would show unto the Court that Defendant MANGES, acting by and through DCRC, filed suit against Plaintiffs on August 15, 1972, seeking, among other things, to enjoin Plaintiffs from producing oil, gas, and other minerals under a mineral lease they held on the lands hereinbefore described, which such lands were adjacent to DCRC.

IV.

Plaintiffs further allege that a hearing was held and on January 5, 1973, Defendant CARRILLO, in abuse of his judicial discretion, enjoined these Plaintiffs from "pumping, flowing or producing any petroleum or oil from leases located in Duval County, Texas, from which the aforesaid Defendants have been producing petroleum and oil".

V.

On January 23, 1975, said injunction was dissolved by the 9th Court of Civil Appeals and in that case the Court of Civil Appeals held that the trial court abused its discretion by granting said writ of temporary injunction.

VI.

That by virtue of said writ of injunction production under said lease was suspended from January 18, 1973 until June 25, 1975, a total of 31 months, and that after said injunction was dissolved, an additional 2 months was required to get the wells back into production.

VII.

That during the 33 month period in which the three wells in question were not producing, the reservoir, from which the complainants had been producing prior to the injunction, was mined by other operators who did not come under the temporary injunction issued by the 229th District Court and the recovery of 13,000 barrels of crude oil was irreparably lost as a result of the temporary injunction. The fair market price for production from stripper wells during the injunction period was Thirteen and No/100 ($13.00) Dollars per barrel. Therefore, Plaintiffs were damaged by the lost production in the amount of One Hundred Sixty Nine Thousand and No/100 ($169,000.00) Dollars plus legal fees and expenses for defending against the suit in the amount of Fifteen Thousand and No/100 ($15,000.00) Dollars, or total actual damages in the amount of One Hundred Eighty Four Thousand and No/100 ($184,000.00) Dollars.

VIII.

That Plaintiffs' damages were the direct result of wrongful issuance of the injunction, as aforesaid, and Defendants MANGES, DCRC, and CARRILLO are therefore liable to Plaintiffs for the amount of actual damages suffered.

IX.

Additionally, Defendants MARTENS and DENNIS signed as sureties on the appeal bond of Defendant DCRC, and are therefore liable to Plaintiffs to the extent of their bond and should be ordered to pay said amount to the Claimants herein.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that Defendants be cited to appear and answer herein, and that upon a final hearing hereof, these Plaintiffs have judgment for actual damages of One Hundred Eighty Four Thousand and No/100 ($184,000.00) Dollars, punative damages in the sum of Three Hundred Sixty Eight Thousand and No/100 ($368,000.00) Dollars plus such additional sums the Court may fix and that Plaintiffs do have and recover from MARTENS and DENNIS such amount as Defendants MANGES, DCRC and CARRILLO do not properly pay within the provision of said bond, and for costs of Court, and for such other and further relief, both in law and in equity, as Plaintiffs shall show themselves justly entitled.

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THE COURT: Gentelemen, do you wish to present any argument?

MR. SMITH: Your Honor, since that was presented under a bill, we will make no answer to it. I believe the matter, as far as we are concerned, has been adequately taken care of as far as proof. I think the evidence that has come in today has been irrelevant, and I don't believe has touched the matter of the disqualification of Judge Carrillo. I think the sort of thing they are thinking of, that possibly some people agreed to it, or submitted it, does not in any way affect the disqualification. The parties cannot by agreement make him qualified if he is disqualified. Otherwise, I believe our briefs are adequate.

MR. BATES: I have nothing, your Honor.

MR. CHURCH: I have no argument.

THE COURT: Well, gentlemen, it is kind of hard for a Judge to make this decision regarding a fellow Judge, but it is the opinion of the Court that Judge Carrillo is disqualified as of—well, say the first of February, 1971. I don't want my ruling in any wise to prejudice the rights of any of the parties or reflect on anyone. But I feel that the promiscuous—Judge Carrillo, I think, has been honest. I don't think he feels he is disqualified or has done anything wrong. But the fact remains that he unquestionably—the negotiations with reference to the sale of the—or the transfer of the house and lot in Benavides, took place after—that is, it originally took place before he went in office, and was finally consummated after he was in office. Also, there was a

lease on a number of acres of land, I don't know now how many acres—you might say a free lease for a short period of time, I don't remember how long, which would have amounted to a gift. Then the lease on some five or six thousand acres of land at a price of $5,000.00 per year for three years, payable at the end of the term, and also for the right of Mr. Manges to terminate at any time he wished, would be a financial interest that would go with this case. It would be expensive for him to move his cattle. And he would have to pay up what was owing on the lease at that time. Also, Mr. Manges is by far the greatest controlling stockholder of the bank, and the appointment as a director would have been a financial interest to him, even though small in comparison with the amounts involved in this law suit. And then the fact that Mr.—that the bank, in which the litigant, Mr. Manges owned possibly three-quarters interest in it, by far the controlling interest, was making loans to him up to two or three hundred thousand dollars. As I recall, one of the notes, for two or three hundred thousand dollars, was payable in one year, and the fact that the note could easily be demanded to be paid at maturity, or extended at the will of Mr. Manges. All of these things, and other matters, are like the sword of Damocles, hanging over the head of the Judge by a thin hair. I don't see how a person in that predicament could possibly render an impartial judgment. I couldn't. It's bad, but this is a matter that can be raised at any time. It could be raised after judgment, and it would have to be done all over again. It would be just wiped out. If you have another Judge hear it, he could go over this matter, and vindicate the decisions of Judge Carrillo, if that is correct, or render whatever judgment is correct. That is

the reason I don't want in any manner to make any ruling that would in anywise be construed as either ratifying and confirming, or the opposite, holding that there was anything unjust. In my opinion, in other words, what I am saying is I am not accusing—no, that's not exactly the word—I don't mean to hold any of his decisions are not correct. I have no way of knowing that. The fact that they were correct or not correct, in my opinion, does not touch the question of disqualification. It goes to the root of our system itself. Our Courts are under pressure and subject to criticism on many things that are unjust. And our Courts are the very foundation of our system of society. And if our Courts become corrupt, then there is no justice in the land. And where there is no justice in the land, the only recourse is revolution and bloodshed, and then all people suffer. We, as Judges, must be like Caesar's wife, above and beyond reproach. It is hard enough to render justice and meet the criticism of people on decisions we are called on to make that are controversial, without the burden of anything else that can at all be questionable. I like Judge Carrillo. I have always thought a lot of him. He is young, and he is inexperienced on the bench, but he was kind of caught in a web of circumstances that bound him in this particular case. So it will be the judgment of the Court that he is disqualified.

MR. BATES: Please the Court, on behalf of the Receiver, I ask the Court to make findings and conclusions of law, and give such notice as is necessary in open Court at this time, to appeal the judgment.

THE COURT: I don't know whether you can appeal it or not. I hope you can.

MR. BATES: Well, if we can't, we will try the mandamus route.

THE COURT: I hope you can. Either way I decide on this, the appellate Court can decide the opposite.

MR. BATES: Should I make a more formal request than I make now for findings and conclusions, or will that suffice.

THE COURT: I think that will be sufficient. All right, gentlemen, Court is adjourned.

No. 3953

IN THE DISTRICT COURT
229th JUDICIAL DISTRICT
STARR COUNTY, TEXAS

CLINTON MANGES,
Plaintiff

vs.

M. A. GUERRA, ET AL,

ORDER ON MOTION FOR
DISQUALIFICATION OF JUDGE

BE IT REMEMBERED that on the 15th day of January 1973, there came on to be heard before Honorable O. P. Carrillo, Judge of the 229th District Court of Starr County, Texas the motion of defendants, R. R. Guerra and M. A. Guerra that the Judge recuse or disqualify himself from sitting in this cause, and the said Judge O. P. Carrillo, after hearing testimony, evidence and arguments of counsel on said motion, on February 5, 1973 requested Honorable J. R. Alamia, Presiding Judge of the Fifth Judicial Administrative Judicial District to appoint another judge to hear and decide said motion; and the said Judge Alamia appointed the undersigned, Judge Magus F. Smith, Judge of the District Court of Hidalgo County, 93rd Judicial District to hear and decide said motion; whereupon, hearings were held thereon by the undersigned Judge on the 20th day of February, 1973, March 30, 1973 and April 23, 1973, at the conclusion of which hearing said movants R. R. Guerra and M. A. Guerra, rested, as did the Plaintiff, Clinton Manges, who

opposed said motion. The Plaintiff, Clinton Manges was given until May 7 to answer briefs filed by movants, and the movants were given until May 14 to file a rebuttal brief, after which the matter was submitted for decision. On May 11, 1973, the Receiver, James S. Bates filed a motion to re-open the hearing for additional testimony, which motion was set down for hearing on Friday, May 18, 1973, and on such date the motion was heard and granted.

IT IS THE OPINION OF THE COURT, after considering all of the relevant evidence, the briefs and arguments of counsel, that the law and facts support the motion to disqualify; that the transactions between the Judge and the Plaintiff, Clinton Manges involved the judge with a disqualifying interest in the case.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that Honorable O. P. Carrillo, Judge of the 229th District Court of Starr County, Texas is disqualified to sit as judge in the above styled and numbered cause as of February 1, 1971.

SIGNED AND ENTERED THIS the 21st day of May, 1973.

/s/ MANGUS F. SMITH
Judge Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION
CORPUS CHRISTI, TEXAS

CIVIL ACTION No. 76-C-2

SIDNEY A. SPARKS, R. L. LYND, d/b/a
SIDNEY A. SPARKS, TRUSTEE,
Plaintiffs

vs.

DUVAL COUNTY RANCH COMPANY, INC.,
CLINTON MANGES, CLARENCE MARTENS,
ORVILLE E. DENNIS and O. P. CARRILLO,
Defendants

SECOND AMENDED MOTIONS TO DISMISS,
FIRST AMENDED ORIGINAL ANSWER AND
FIRST AMENDED CROSS-CLAIM OF
DEFENDANT, ORVILLE E. DENNIS

TO THE HONORABLE DISTRICT COURT:

Now Comes ORVILLE E. DENNIS, one of the Defendants herein and for answer to Plaintiffs' First Amended Complaint would respectfully show the following:

I.

The Plaintiffs have failed to state, in their asserted "First Cause of Action" in their First Amended Complaint, a claim against this Defendant under 42 U.S.C. Section 1983 for the reason that Plaintiffs allege no facts which implicate this Defendant in any alleged conspiracy to deprive Plaintiffs of their alleged civil rights. Plaintiffs

have only alleged the fact that this Defendant lawfully acted as surety on a bond given to a State of Texas District Court proceeding pursuant to the laws and rules of civil procedure of the State of Texas.

Further, by their First Amended Complaint, they merely repeat their allegations made in the Original Complaint and, while altering some phraseology, add nothing substantive to the allegations in their Original Complaint.

Plaintiffs have failed to state in their asserted "First Cause of Action," a claim against this Defendant under 42 U.S.C. Section 1983 because the facts alleged in said "First Cause of Action" establish as a matter of law that this Defendant was not acting under color of state law. The Plaintiffs have included some additional conclusions, but still fail to aver facts supporting a statement of any claim against this Defendant, or any Defendant for that matter, under 42 U.S.C. Section 1983. Plaintiffs still fail to allege any facts which implicate this Defendant in any alleged conspiracy to deprive Plaintiffs of their alleged civil rights.

In fact, from their allegations, it is uncontroverted that the whole scheme of conspiracy hinges on the conduct of O. P. Carrillo as State District Court Judge, made immune under the law and specifically excluded from the ambit of 42 U.S.C. 1983. Thus, even assuming their conclusionary allegations as true, for the purposes of argument, Plaintiffs only establish that, while acting in alleged concert with Judge O. P. Carrillo, Defendant Dennis was not acting under color of state law because Carrillo was not acting under color of state law as that concept has been applied by the courts in construing 42 U.S.C. Section 1983.

WHEREFORE, Defendant ORVILLE E. DENNIS, prays that the alleged "First Cause of Action" in Plaintiffs' First Amended Complaint be dismissed as to this Defendant and/or this Court proceed no further as to this Defendant with respect to said asserted "First Cause of Action" in Plaintiffs' First Amended Complaint.

II.

Subject to the above and foregoing Motion, and without waiving same, Defendant moves that the "second count" of Plaintiffs' First Amended Complaint be dismissed because the United States District Court for the Southern District of Texas has no jurisdiction of the subject matter of the second count in Plaintiffs' First Amended Complaint nor jurisdiction of this Defendant as to such subject matter for the reason that Plaintiffs allege therein a claim often referred to as that for "wrongful injunction" whereby the Plaintiffs seek damages against the named several Defendants, including seeking damages against this Defendant on the injunction bond. Defendant would show the Court that it has no jurisdiction over the claims asserted in the said "second count." These are claims cognizable in state court, if at all. No federal law or federal question is involved. Further, Plaintiffs do not allege, nor is there, diversity among the parties.

Furthermore, this Court does not have pendent jurisdiction over the claim alleged by Plaintiffs in their "second count."

WHEREFORE, Defendant, ORVILLE E. DENNIS, prays that Plaintiffs' First Amended Complaint be dismissed as to the "second count" asserted therein and that

this Court proceed no further as to the Defendant with respect to the subject matter of the "second count" of Plaintiffs' First Amended Complaint.

III.

Subject to and without waiving the above and foregoing, Defendant, in answer to Plaintiffs' First Amended Complaint, would show the Court as follows:

1. Defendant denies all allegations in paragraph I, first cause of action.
2. Defendant admits that he resides within the District and Division of this Court, but denies that he is a resident of Jim Wells County, Texas. Defendant is a resident of Nueces County, Texas. With respect to all other allegations made by Plaintiffs in paragraph II, first cause of action, Defendant can neither admit nor deny the allegations of Paragraph II, "first cause of action" because he does not have any reliable information in that regard.
3. Defendant denies that he was involved in any way with any alleged conspiracy to deprive Plaintiffs of any rights, privileges and immunities under the Constitution and laws of the United States. As to the other allegations in paragraph III, first cause of action, Defendant can neither admit nor deny said allegations because he does not have any reliable information in that regard.
4. Defendant can neither admit nor deny the allegations of Paragraphs IV through IX, first cause of

action, because he does not have any reliable information in that regard.

5. Defendant can neither admit or deny the allegation in paragraph X, first cause of action, that the injunction bond of $5,000.00 was low or high. Defendant denies that he signed the $5,000.00 injunction bond to aid anyone in any alleged unlawful purpose. Further, Defendant denies that in signing said injunction bond that he knowingly and intentionally aided in any alleged conspiracy. Defendant has no knowledge of any conspiracy by anyone to damage Plaintiffs. Anyone conforming with the laws and rules of civil procedure of the State of Texas had the lawful right to, and could, have performed as a surety on the $5,000.00 injunction bond. Plaintiffs allege no facts which raise or state any claim or cause of action as to this Defendant for any unlawful conspiracy to deprive Plaintiffs of any rights.

6. Defendant can neither admit nor deny the allegations of Paragraphs XI and XII, First Cause of Action, because he does not have any reliable information in that regard.

7. Defendant denies committing any wrongful act as alleged in paragraph XIII, First Cause of Action. As to all other allegations in said paragraph XIV, Defendant can neither admit nor deny any of them because he does not have any reliable information in that regard. Defendant denies any liability for any punitive damages to Plaintiffs.

8. Defendant can neither admit nor deny the allegations of Paragraphs I through VIII, Second Count,

because he does not have any reliable information in that regard.

9. With respect to the alegations of Paragraph IX, Second Count, Defendant denies signing as surety any "appeal" bond for Co-Defendant DCRC in the injunction suit to which Plaintiffs apparently refer. Defendant denies any liability to Plaintiffs on any such bond. Further, Defendant denies any liability to Plaintiffs on the $5,000.00 injunction bond which Defendant signed as a surety along with Co-Defendant, Clarence Martens.

FIRST AMENDED CROSS-CLAIM AGAINST DEFENDANT, DUVAL COUNTY RANCH COMPANY, INC., AND AGAINST DEFENDANT, CLINTON MANGES

For a Cross-Complaint against Co-Defendants, Duval County Ranch Company, Inc., and Clinton Manges, this Defendant, ORVILLE E. DENNIS, alleges that any liability he may have because of the foregoing allegations of Plaintiffs is only that of indemnitor, as surety on the $5,000.00 injunction bond in the state court injunction proceedings of which Plaintiffs complain, and that Co-Defendants, Duval County Ranch Company, Inc., and Clinton Manges, are primarily liable, if at all. Should damages be awarded against this Defendant, then this Defendant prays that he have judgment for indemnity against the Defendants, Duval County Ranch Company, Inc., and Clinton Manges.

WHEREFORE, PREMISES CONSIDERED, Defendant ORVILLE E. DENNIS, prays to the Court that on hearing hereon that the "First Cause of Action" asserted

in Plaintiffs' First Amended Complaint be dismissed as to this Defendant for failure to state a claim and or that the "Second Count" asserted in Plaintiffs' First Amended Complaint be dismissed for lack of subject matter jurisdiction; but that if there be any trial hereon, that Plaintiffs take nothing as against this Defendant and that this Defendant be discharged and recover his costs from Plaintiffs; but that, further, if Plaintiffs recover anything from this Defendant, then this Defendant should be fully indemnified by the Co-Defendants, Duval County Ranch Company, Inc., and Clinton Manges, to the full extent of this Defendant's liability to Plaintiffs, if any; and this Defendant prays for such other and further relief, special and general, in law and in equity, to which he may show himself entitled.

Respectfully submitted,

By_____

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ORDERS, OPINIONS AND JUDGMENTS PRINTED IN APPENDIX IN PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 1, 1980
(abbreviated herein as "Pet. App.")

1. Order of the United States District Court for the Southern District of Texas, dated December 17, 1976, ordering that claims against Defendants (including Petitioner) be dismissed for failure to state a claim upon which relief can be granted — See Pet.App.,A1

2. Judgment entered by the United States District Court for the Southern District of Texas, filed on December 20, 1976, in favor of Defendants (including Petitioner) against Sidney A. Sparks, et al — See Pet.App.,A4

3. Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit, dated January 17, 1979, affirming District Court — See Pet.App.,A5

4. Opinion on Rehearing en banc of of the United States Court of Appeals for the Fifth Circuit, dated October 22, 1979, affirming District Court in part and reversing in part (as to Petitioner) — See Pet.App.,A11

5. Judgment of the United States Court of Appeals for the Fifth Circuit dated October 22, 1979, affirming in part and reversing in part (as to Petitioner) the judgment of the District Court	See Pet.App.,A41
6. Order of the United States Court of Appeals for the Fifth Circuit, dated December 14, 1979, denying Petition for Rehearing (filed by Petitioner)	See Pet.App.,A43

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Appendix have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to the counsel of record for the Respondents, as follows: Mr. Garland Smith, P. O. Drawer 1104, Weslaco, Texas 78596 on the _____ day of May, 1980.

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Supreme Court, U. S.
FILED
FEB 25 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979

NO. 79-1186

ORVILLE E. DENNIS,
Petitioner

v.

SIDNEY SPARKS and R. L. LYND, d/b/a
SIDNEY SPARKS, TRUSTEE,
Respondents

REPLY OF RESPONDENTS TO PETITION OF ORVILLE E. DENNIS FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	IV
Opinions Below	3
Jurisdiction	3
Question Presented	3
Statutes Involved	3
Statement of the Case	5
Reasons for Denying the Writ	5
I. The en banc decision of the Court of Appeals is correct ...	7
A. Public policy demands independent judges; but also, honest judges	7
B. Inconvenience to judges is outweighed by sound policy considerations	9
C. Availability to testify of all persons with relevant knowledge is essential to the judicial process	10
D. A flood of frivolous litigation will not follow	12
E. Private persons will not be discouraged from seeking aid of the judicial process ...	13

II. Conflicts between circuits may be resolved by denying certiorari, or if the writ is granted, by affirming the Court below on the issue of derivative immunity 14

A. Precedents relied on by Petitioner do not factually apply 15

B. Need for a Federal forum is imperative 16

1. Judicial corruption in Duval County is deep seated and of long standing 18

2. State reforms, though helpful, are not adequate 21

3. Sparks-Lynd are not the first to seek a Federal forum 23

4. The option of a Federal forum is indispensable. 24

5. The problem is national as well as local 26

III. Conclusion 27

Signatures 28

Certificate of Service 29

Appendix -

Map of 229th Judicial District of Texas A-1

TABLE OF AUTHORITIES

Page

CONSTITUTIONS AND STATUTES

United States Constitution
Article II, Section 4 ---------- 4

Texas Constitution
Article V, Section 1a ---------- 22
Article V, Section 11 ---------- 4
Article XV, Section 6 ---------- 4
Article XVI, Section 41 ---------- 4, 21

18 United States Code, Section 1841 -- 21

42 United States Code, Section
1983 ---------- 2, 3, 8, 14, 16, 28

TEXT AUTHORITIES

de Toqueville, Alexis, "Democracy
in America" ---------- 17

Hamilton, Federalist Paper No. 60 ---- 16

Jefferson, Living Thoughts of, by
John Dewey ---------- 16

Madison, Federalist Papers Nos. 10,
43 and 51 ---------- 16

CASE AUTHORITIES

In Re: O. P. Carrillo, District
Judge, Tex. Ct. 1976,
542 SW2d 105 ---------- 22

In re Laughlin, District Judge, Tex. Sup. Ct. 1954, 265 SW2d 805- 18, 22

Clinton Manges v. M. A. Guerra, et al, No. 3953 in the 229th District Court of Starr County, Texas (order holding Judge O. P. Carrillo disqualified, full text in S-L App., p. 65a-66a) ---------- 21

Parr v. U.S., 5th Cir. 1959, 265 F2d 894 ---------- 20, 23

Parr v. U.S., U. S. Sup. Ct. 1960, 363 U.S. 370, 4 L.ed.2d 1277, 80 S. Ct. 1171 ---------- 20, 23

Sidney A. Sparks and R. L. Lynd, d/b/a Sidney A. Sparks, Trustee, 5th Cir. 1979, 588 F2d 124 (Text in full in Dennis App., p. A5-A10; and S-L App., p. 34a-39a) ---------- 5

Sidney A. Sparks and R. L. Lynd, d/b/a Sidney A. Sparks, Trustee, 5th Cir. 1979, 604 F2d 976 (Text in full in Dennis App., p. A11-A24; and S-L App., p. 2a-16a) --------- 1, 5, 9, 10, 15, 16

Winslow, et al v. Duval County Ranch Company, Inc., Tex. Civ. App. 1975, 519 SW2d 217 ---------- 24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

NO. 79-1186

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SIDNEY SPARKS and R. L. LYND, d/b/a
SIDNEY SPARKS, TRUSTEE,
Respondents

REPLY OF RESPONDENTS TO PETITION OF ORVILLE E. DENNIS FOR WRIT OF CERTIORARI

Respondents here support the en banc holding below, Sidney A. Sparks and R. L. Lynd, d/b/a Sidney A. Sparks, Trustee, vs. Duval County Ranch Company, Inc., et al, Fifth Cir., 1979, 604 F2d 976, as to the holding that private parties who conspire with a state judge in violation of 42 USC,

Section 1983, do not derive immunity from the co-conspiring judge who is held to be immune under the doctrine of judicial immunity. Respondents challenge that part of the en banc decision which accords immunity to the judge involved, as petitioners in No. 79-1239, Sidney A. Sparks and R. L. Lynd, d/b/a Sidney A. Sparks, Trustee, v. Duval County Ranch Company, Inc., Clinton Manges, Orville Dennis, Clarence Martens and O. P. Carrillo, Respondents. Since both petitions for review grow out of the same complaint below we presume the two will be considered together. Each petition has attached an appendix, containing relevant material. The appendix attached to the Dennis Petition will be herein cited as "Dennis App., p. __," and the appendix attached to the Sparks-Lynd Pe-

tition will be herein cited as "S-L App., p. __."

OPINIONS BELOW

Correctly stated and correctly included in the appendix to the Petition of Orville E. Dennis (hereafter "Dennis").

JURISDICTION

We do not contest this Court's jurisdiction as stated.

QUESTION PRESENTED FOR REVIEW

The Dennis Petition correctly states the question.

STATUTES INVOLVED

42 USC, Section 1983

> "§1983. Civil action for deprivation of rights
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. §1979.)"

Texas Constitution, Article XVI, Section 41

"§41. Bribery and acceptance of bribes

NOTE: This Constitutional provision appears in full in No. 79-1239, S-L App., p. 43a-44a and is not here repeated.

U.S. Constitution, Article II, Section 4.

"Section 4. Removal from office.

"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Texas Constitution, Article XV, Section 6.

"§6. Judges of District Court: removal by Supreme Court

NOTE: This Constitutional provision appears in full in No. 79-1239, S-L App., p. 44a-45a, and is not here repeated.

Texas Constitution, Article V, Section 11.

"§11. Disqualification of judges; exchange of districts; holding court for other judges

"Sec. 11. No judge shall sit in any case wherein he may be interested," etc.

STATEMENT OF THE CASE

Except as reference may be made to undisputed matter, considered helpful in understanding this case, the statement as contained in the panel decision, 588 F2d 124 (Dennis App., p. A5-A10; and S-L App., p. 34a-39a), and the en banc decision, 604 F2d 976 (Dennis App., p. A11-A24; S-L App., p. 2a-16a), together with the partisan statements of petitioners in Nos. 79-1186 and 79-1239, adequately present the facts here involved.

REASONS FOR DENYING THE WRIT

Petitioner asserts (pages 7-17) that the en banc decision is against public policy:

First, that suits against private persons would raise issues of the judge's participation, actions and motives; second, the judge would be subject to discovery and pre-trial procedures; third, that the judge would be a witness; fourth, that disappointed litigants in state courts would flock to federal courts to retry their grievances; and fifth, that private persons would no longer seek aid of state judges because their acts in doing so might be a conspiracy from which they would not have immunity. These arguments are grounded on speculation that conspiracy law would be torn from its anchorage; that commitment of members of the Bar to their code of professional responsibility is fragile; and that judges are by the decision below shorn of their competence to deal with frivolous suits. We will answer under the num-

bers and general headings of Dennis' Petition:

I.

THE DECISION EN BANC OF THE COURT OF APPEALS IN DENYING DERIVATIVE IMMUNITY TO PRIVATE PARTIES WHO CONSPIRE WITH A STATE JUDGE IS NOT IN CONFLICT WITH SOUND PUBLIC POLICY, BUT IS CONSISTENT THEREWITH.

A. Public policy demands independent judges; but also, honest judges: Dennis' Petition notes the early enunciation of the doctrine of judicial immunity in 1608 (p. 9), at which time the dominant theory of government was the "divine right of kings." Centuries of war and civil strife have toppled monarchs who held on too long, while those who made reasonable concessions have survived. Judges have fared better.

The doctrine of judicial immunity, although judge made, has survived largely due to general excellence of those attorneys who have assumed judicial duties. Abuse has been sufficiently rare that the doctrine has never come under scrutiny of a groundswell of public clamor. Yet, when an individual judge is corrupted, his potential for evil is so great that to permit Sec. 1983 civil suit against those who corrupted him, is, we submit, a wholesome act of the judiciary disciplining itself. Reform should come through careful judicial surgery, not through protecting the corrupt judges and their co-conspirators until scandals bring reform by meat ax legislation.

The arguments of Dennis' Petition are completely answered by the en banc opinion, and will not be here discussed case by case.

Immunity is grounded as much on honesty and integrity as on independence. In fact, honesty and integrity are the end, and independence is only a means whereby the end is served. When a judge accepts a bribe, as here, integrity and independence of the judiciary go down together.

B. Inconvenience to judges is outweighed by sound policy considerations:

Dennis' second argument that judges would be diverted by "discovery procedures and pretrial practices" is fully answered by the en banc decision (Dennis App., p. A17, par. [7]; S-L App., p. 9a, par. [7]). The Court said:

> Sound policy suggests that attempts by such persons to subvert the judiciary should be penalized in every just way, civil as well as criminal. It suggests that the fullest redress that the judicial system can accommodate while functioning effectively should be granted for such odious wrongs. And it suggests that the actual

> incentive to corruption held out by the present doctrine, with its promise of civil immunity to those who succeed in involving a judge's powers in their nefarious schemes, should be removed.

The true public interest could hardly be better stated.

C. Availability to testify of all persons with relevant knowledge is essential to the judicial process: It seems incredible that we are here arguing whether a judge should be required to give testimony within his knowledge relevant to matters affecting integrity of the judicial process. As observed by the majority below the inconvenience to the judge is slight weighed against "the advantages gained by punishing those who subvert the judiciary." (Dennis App., p. A19; S-L App., p. 10a-11a). The public policy behind the doctrine of immunity is to preserve the independence of honorable jud-

ges, not to conceal the corruption of those who stray. The dissent (Dennis App., p. A37; S-L App., p. 29a) may have laid down a valid test to separate the good from the bad, in its reference to the "chilling effect of submission to discovery and the appearance as a witness." We submit that the honorable judge, who has conducted himself according to the Code of Judicial Conduct, even though he may have made an erroneous ruling, would feel no chilling effect from answering honestly any questions propounded to him. However, if he had accepted bribes from a litigant, or had held secret ex parte communications and reached unlawful accords with a litigant, then his dilemma of whether to (1) take the fifth; (2) tell the truth and expose himself; or (3) to add perjury to his offense and hope not to be caught, would indeed be chilling. It should be!

D. A flood of frivolous litigation will not follow: To open the Section 1983 gate wide enough to permit suit against a litigant who bribed a judge and others who conspired with him (where the fact of bribery is res judicata) to induce a corrupt judgment that takes plaintiff's property, is too narrow an opening to invite a flood of litigation against honorable judges.

This Court must, as the majority below did, base its judgment on the facts in this case alone. The Court may not ignore such facts and presume that we are dealing with an honest judge who made an honest mistake and is hauled into court under false and frivolous pleadings by a "jailhouse lawyer" bent on revenge.

The integrity and ethics of the legal profession have not so degenerated that at-

torneys in great numbers will rush to file false pleadings against honorable judges and create a flood of frivolous litigation; nor has the competence of the judiciary to deal with false or frivolous pleadings and to enforce the disciplinary rules of the Bar, gone into eclipse. For centuries the avenue of impeachment has been open to litigants so inclined to falsely attack honorable judges, and the process has not been abused. Neither will abuse result from the decision of the majority below.

E. Private persons will not be discouraged from seeking aid of the judicial process: Petitioner Dennis here argues (p. 15, Fifth) that private persons will be afraid to seek the aid of state courts, lest they be hauled into federal court, charged with a conspiracy. Such argument begs the question, and is no more valid than would be

an argument that the law of conspiracy alone should frighten strong men out of making contracts--lest the contract itself involve them in a charge of conspiracy. There is yet the matter of illegality, the bribe, the unlawful ex parte agreement between the judge and a litigant, etc.--the indispensable ingredient which is rarely present; but if present, relief should be available under Sec. 1983.

II.

THERE ARE CONFLICTS BETWEEN THE CIRCUITS AS TO LIABILITY UNDER 42 UNITED STATES CODE SECTION 1983 OF PRIVATE PERSONS WHO CONSPIRE WITH AN IMMUNE STATE JUDGE, BUT SUCH CONFLICT MAY BE RESOLVED BY DENYING THE PETITION FOR CERTIORARI; OR IF GRANTED, BY AFFIRMING THE COURT BELOW ON THE ISSUE OF DERIVATIVE IMMUNITY.

A. Precedents relied on by Petitioner do not factually apply: The appellate courts have not heretofore had before them a fact situation where the judge in question had accepted a bribe for which he had agreed in advance to perform a corrupt judicial act. The implication that a judge is immune no matter how corrupt his acts may be, is dicta. The issue of actual, proven corruption is here presented.

The majority below observed first that to permit private persons to derive immunity from a judge holds out "the actual incentive to corruption" by "its promise of civil immunity to those who succeed in involving a judge's powers in their nefarious schemes," (Dennis App., p. A17; S-L App., p. 9a) and concluded that such concept of conspiracy law "is sustained by neither reason nor author-

ity." (Dennis App., p.A19-20; S-L App., p. 11a)

B. Need for a Federal forum is imperative: The founding fathers foresaw the emergence of corrupt political machines which would dominate local areas, and saw in the U. S. Constitution relief for those oppressed thereby. Section 1983 is only a legislative implementation of the Constitution as the protector of the individual (even a minority of one) in his basic rights against governmental harassment.

The Federalist Papers note that in cases of local tyrannies, relief must come from higher echelons of government. See Madison, Federalist Paper, nos. 10, 43, and 51; Hamilton in Federalist Paper no. 60. Jefferson stated his fears of tyranny of local majorities:

> I suspect that the doctrine that small States alone are fitted to be republics, will be exploded by experience, with some other brilliant fallacies accredited by Montesquieu and other political writers. Perhaps it will be found, that to obtain a just republic (and it is to secure our just rights that we resort to government at all) it must be so extensive that local egoisms may never reach its greater part; in its councils free from particular interests, and giving, therefore, an uniform prevalence to the principles of justice. The smaller the societies, the more violent and more convulsive their schisms. (Emphasis ours). (John Dewey, The Living Thoughts of Thomas Jefferson, page 59)

Alexis de Toqueville writing on "Democracy in America" in 1834, shared Jefferson's fears of an unrestrained local, or for that matter, national majority:

> If ever the free institutions of America are destroyed, that event may be attributed to the omnipotence of the majority, which may at some future time urge the minorities to desperation and oblige them to have recourse to physical force. Anarchy will then be the result, but it will have been brought about by despotism.

1. Judicial corruption in Duval County is deep seated and of long standing: This case cannot be understood separate and apart from the sordid history of the corrupt dictatorship which has dominated Duval County, Texas for the past several decades. Appeals by the harassed minority for help from the state level have resulted only in pillow fight support, with the exception of judicial reforms which flowed from the exposure and impeachment of Judge Carrillo. It is a maxim of democracy that a local dictatorship may be established only if there be a secret alliance with the judge. A quarter century ago one district judge for Duval County was removed by the Texas Supreme Court for corruption, but the order removing him specifically authorized him to run for the same office at the next election. In Re Laughlin,

District Judge, Tex. S. Ct., 265 SW2d 805.[1] Although the judge was again elected without difficulty, the lessons learned from removal created impediments, and the bosses needed a judge who was "one of them." The Texas Legislature accommodated them by creation of the 229th Judicial District composed only of Duval and Starr Counties (historically subservient to the machine) and Jim Hogg County, so sparsely settled as to have no electoral impact (Acts of 61st Legislature, 1969 at p. 697, Ch. 239, Sec. 3, effective Sept. 1,

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[1]Judge Laughlin did run for election at the next election and continued to serve as Judge of the 79th District Court, which included Duval and Starr Counties, as well as other more populous counties. He still serves as Judge of the 79th District, although Duval and Starr Counties were removed from the 79th and placed in the newly created 229th Judicial District by legislative act in 1969. (V.A.T.S., Art. 199, Sec. 229).

1969; no V.A.T.S., Art. 199, Sec. 229).[2] Who better could serve as judge of this newly created court than O. P. Carrillo, who, with his father, one brother and some 17 others, was convicted in Federal Court for fraud of political subdivisions in Duval County, Texas, in violation of 18 U.S.C., Sec. 1841? The conspiracy was carried out in the early 1950's. (Parr v. U.S., 5th Cir. 1959, 265 F2d 894) The convictions were overturned by the U. S. Supreme Court not on grounds that the thefts had not been committed, but that the case stretched the mail fraud statutes too far. (Parr, et al v. U.S., S. Ct. 1960, 363 U.S. 370, 4 L.ed.2d 1277, 80 S. Ct. 1171)

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[2]This act was passed by Texas Legislature presided over by a Speaker who with other officials was convicted of bribery in connectionwith the Sharpstown scandals, the Texas Watergate. (Mutscher v. State, Ct. of Crim. App. of Texas, 1974, 514 SW2d 905).

Justices Frankfurter, Harlan and Stewart dissented.

O. P. Carrillo was elected Judge of the 229th District Court in November 1970 and took office January 1, 1971. The state judge appointed to hear the disqualification matter found that the transactions between Manges and Judge Carrillo amounted to a gift (bribery under Texas Constitution Art. XVI, Sec. 41; see finding S-L App., p. 61a-64a), for which reason the judge was disqualified as of February 1, 1971, exactly one month after his term began (S-L App., p. 65a-66a).

2. State reforms, though helpful, are not adequate: Following Judge Carrillo's disqualification, a falling out between the political bosses projected his fate into an impeachment proceeding in the Texas Legislature, and a removal proceeding by the Texas Judicial Qualification Commission. The Texas

Judicial Qualification Commission was obviously "dragging its feet" to force the Texas Senate to act because only the Senate could remove a judge and bar his again holding office. (See In Re: Laughlin, above) The Senate did convict and bar the Judge from again holding judicial office. The Commission then brought its complaint before the Texas Supreme Court, and the Judge was again removed. The history is reviewed in In re: O. P. Carrillo, District Judge, Tex. S. Ct. 1976, 542 SW2d 105. The next session of the Legislature submitted to the voters, and the voters approved, a constitutional amendment empowering the Supreme Court to bar from again holding judicial office a judge removed for corruption in proceedings initiated by the Commission. (Texas Constitution, Art. V,

Sec. 1a) These reforms are salutary and helpful, and indicate a wholesome movement at the state level away from the former ho-hum attitude that "if the people of Duval County elect corrupt officials, they are only getting what they deserve." Such attitude ignores the concept of a government of laws, and that our Constitution protects the rights of a minority of one.

3. Sparks-Lynd are not first to seek a Federal forum: The harassed taxpayers in Duval County, in the late 1950's, finding local law enforcement impotent, sought the aid of the U. S. Attorney and the Federal Courts to stop thefts from local political subdivisions, as reflected by Parr, et al v. U.S. (cited above). Although fraud on the political subdivisions was judicially determined in Federal Court, no effort was made at

the county, district or state level to recover the stolen funds. Humble Oil & Refining Company, as late as the 1970's, passed over the Justice of Peace Court in Duval County, to file ejectment in Federal Court to remove from the very land here involved, the principal defendant here, Clinton Manges. Why? Winslow, et al, v. Duval County Ranch Co., Inc., Tex. Civ. App. 1975, 519 SW2d 217 at p. 225; or S-L App., p. 80a). In thus seeking a federal forum, Sparks-Lynd have made an election based on judgment obviously shared by the U. S. Department of Justice and the Legal Department of one of the nation's largest corporations.

4. The option of a Federal forum is indispensable: The plaintiff has the option of selecting the forum in which to try his case. The pressures of cost and convenience

all favor the local forum. The very purpose of Section 1983 was to provide an option to select a federal forum in those cases where, due to conspiracy, an individual's constitutional rights would be denied in the local forum. That Judge Carrillo has been convicted and removed from office is in the public interest, but such does not restore Plaintiffs' property unlawfully taken; nor does it insure that Plaintiffs could now get a fair trial in Duval County. We are here dealing with a stubborn situation, where a dictatorship has existed for more than a quarter of a century. Hitler's dictatorship in Germany lasted only 12 years, and we still have an army of occupation in Germany to insure that the population does not return to dictatorship and facism. Removal of a dictator does not remove the danger of dictatorship or corruption.

5. The problem is national as well as local: That the Court may appraise the political danger to the area's inhabitants, to Texas, and to the United States, of a failure to deal realistically with the problem involved, we attach hereto as an Appendix a copy of that part of the map of Texas which shows outlined the three counties comprising the 229th Judicial District. Despite certain press infatuation with the idea that a new, strong and benevolent "Duke of Duval" will emerge from the power vacuum, the more likely prospect is that the new dictatorship will be a home grown mafia, fueled by the drug traffic.

Given the approximate 50 miles frontage of Starr County on the Rio Grande and three counties deep (about 126 miles, stretching almost to San Antonio) and you have a "no

man's land" too large to police. Considering historical judicial subservience, once the drug traffic controls the judge, the cancer cannot be contained. It will affect the entire nation. Speculation, at least, connects the drug traffic with the assassination of U. S. District Judge John Wood of San Antonio. It is a geographical fact, however, that these three counties constitute a direct escape route from San Antonio into Mexico. No real clues have been turned up relating to Judge Wood's assassination, and any speculation beyond the escape route being available, would be wild indeed; but not more so than the speculation that the majority decision below will release a flood of false and frivolous suits against honorable judges.

III.

CONCLUSION

The Court of Appeals correctly held that

private persons who conspire with and corrupt a state judge are liable to suit under 42 United States Code Section 1983, and the petition for certiorari should be denied; or if granted, the en banc decision of the Fifth Circuit should be affirmed as to such private parties. As to Judge O. P. Carrillo, he should be denied immunity as contended in Cause Number 79-1239.

Respectfully submitted,

SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE, Respondents

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I hereby certify that three copies of the foregoing "Reply of Respondents to Petition of Orville E. Dennis for Writ of Certiorari" have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the parties or their counsel of record in the court below, as follows:

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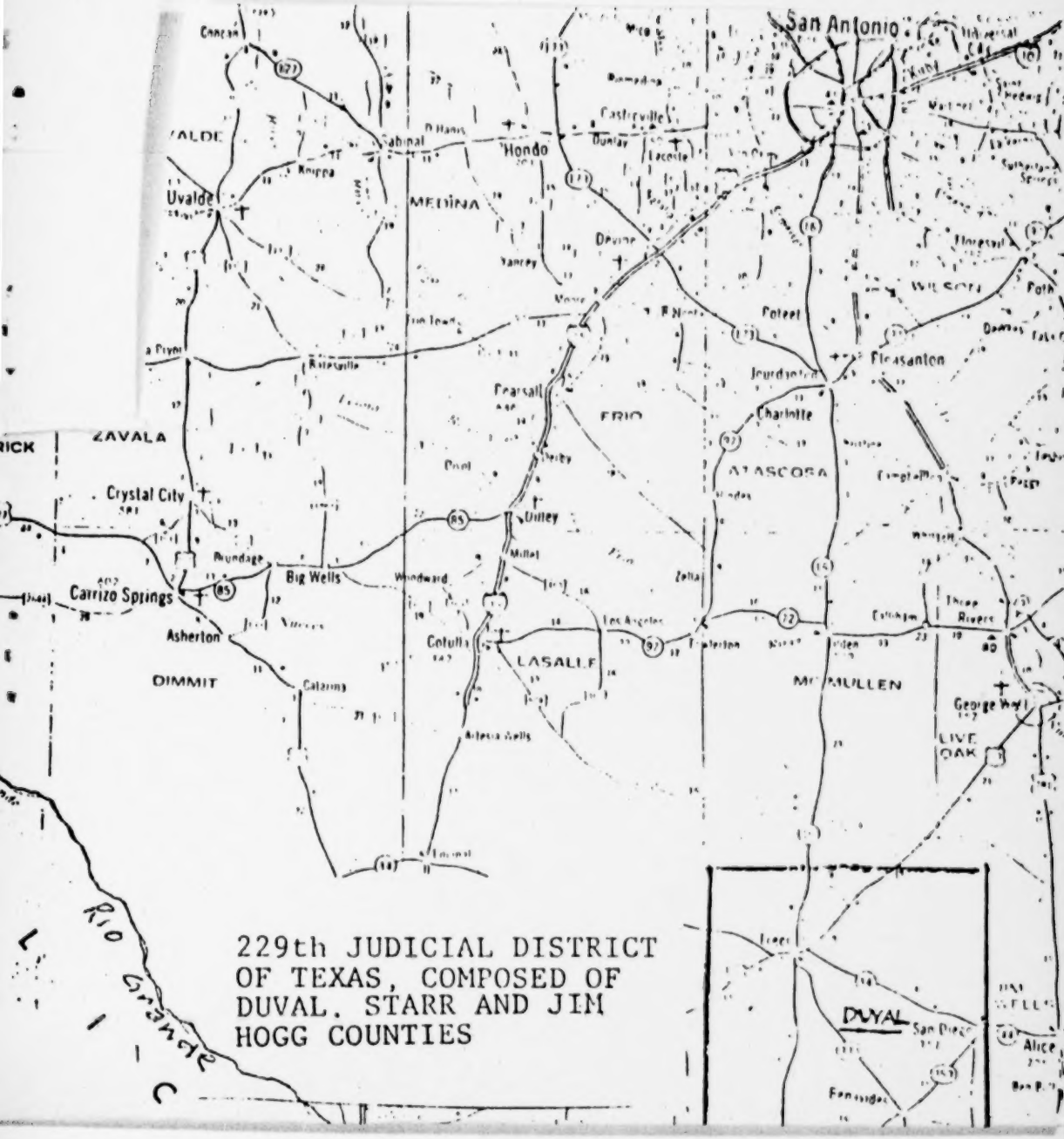
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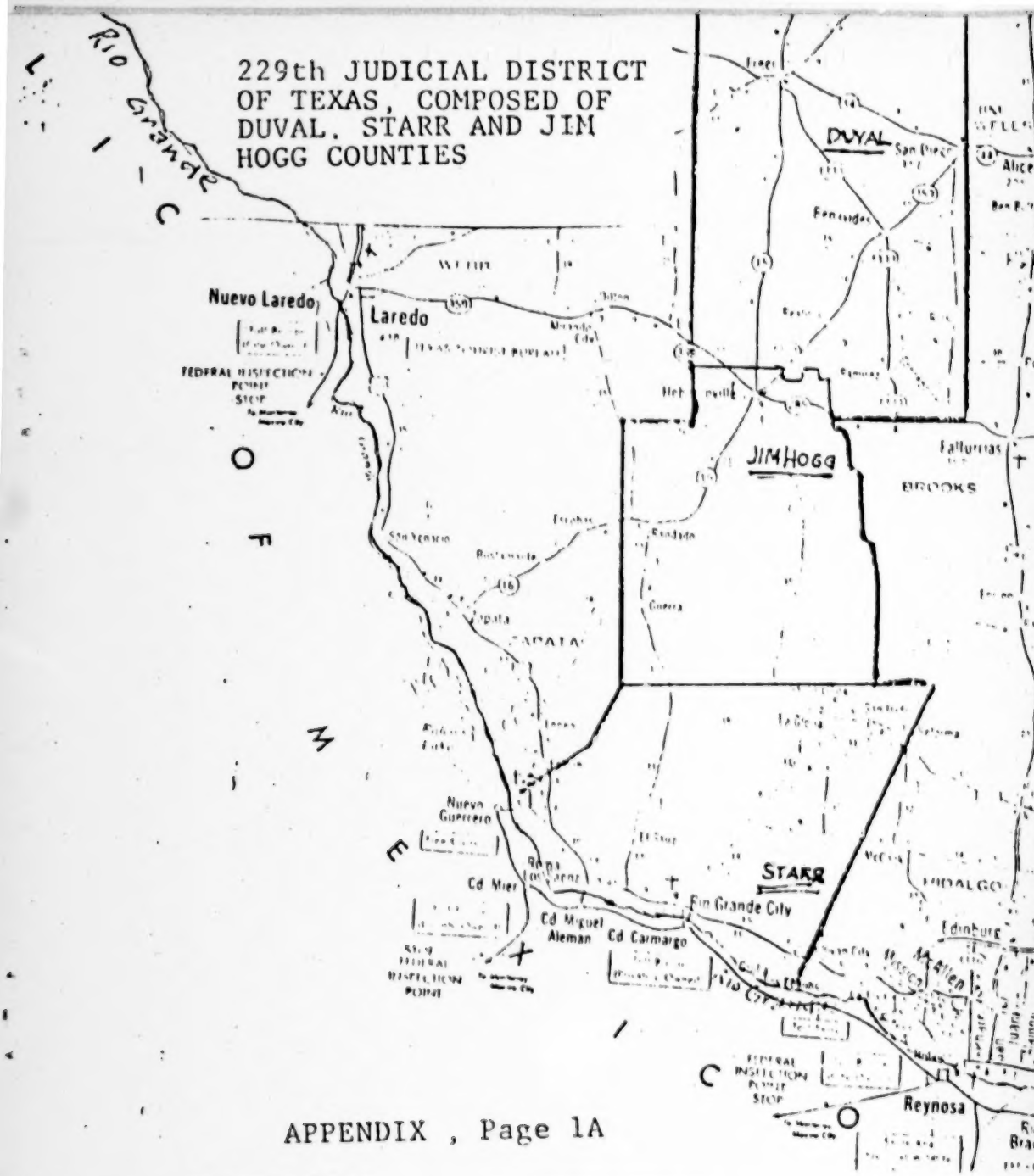
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229th JUDICIAL DISTRICT OF TEXAS, COMPOSED OF DUVAL, STARR AND JIM HOGG COUNTIES

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Supreme Court, U. S.
FILED
MAY 8 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1186

ORVILLE E. DENNIS,
Petitioner

v.

SIDNEY SPARKS and R. L. LYND,
d/b/a SIDNEY SPARKS, TRUSTEE,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Statute involved	2
Question presented	3
Statement	3
Summary of argument	6
Argument	13
I. Introduction	13
II. Public Policy Behind the Doctrine of Judicial Immunity	14
III. The Doctrine is not Qualified by the Judge's Motives	16
IV. Applicability of the Doctrine Depends Upon Existence of Jurisdiction	18
V. The Doctrine is Applicable to Section 1983 Cases	19
VI. Section 1983 and Private Persons	20
VII. A Judge is not a "Person" Under Section 1983	20
VIII. The Majority Rule in the Circuit Courts	21
IX. The Minority Rule in the Circuit Courts	22
X. Erosion of the Doctrine by Collateral Attack	24
XI. Balancing the Relative Harms	26
Conclusion	33
Certificate of Service	34

CITATIONS

CASES	Page
Adickes v. Kress & Company, 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970)	20
Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966) cert. den. 386 U.S. 1021	21
Birley v. California, 564 F.2d 849 (9th Cir. 1977)	22
Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872)	8, 11, 14, 15, 16, 24, 30, 31
Brown v. Dunne, 400 F.2d 341 (7th Cir. 1969)	16, 21
Butz v. Economou, 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978)	18
Fowler v. Alexander, 478 F.2d 694 (4th Cir. 1973)	16, 21
Franklin v. Meredith, 386 F.2d 958 (10th Cir. 1967)	16
French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970) cert. den. 401 U.S. 915	21
Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949)	25, 27
Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974)	16, 18
Guedry v. Ford, 431 F.2d 660 (5th Cir. 1970)	16, 22
Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965)	16, 21, 22
Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975)	16, 21
Hazo v. Geltz, 537 F.2d 747 (3rd Cir. 1976)	21
Hill v. McClellan, 490 F.2d 859 (5th Cir. 1974)	22
Humble v. Foreman, 563 F.2d 780 (5th Cir. 1977)	22
Kermit Construction Corp. v. Banco Credito y Ahorro Ponceno, 546 F.2d 1 (1976)	9, 23, 24
Kurz v. State of Michigan, 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972, U.S. reh. den. 98 S.Ct. 1289	16, 21
Perez v. Borchers, 567 F.2d 285 (5th Cir. 1978) cert. den. 99 S.Ct. 109	16, 22
Pierson v. Ray, 386 U.S. 547 (1967)	9, 11, 15, 17, 20, 21, 24, 25, 26
Rhodes v. Laurino, 444 F. Supp. 170 (E.D.N.Y. 1978)	22
Russell v. Town of Mamoroneck, 440 F. Supp. 607 (S.D. N.Y. 1977)	22
Slavin v. Curry, 575 F.2d 1256 (5th Cir. 1978)	20, 22
Sparkman v. McFarland, 601 F.2d 261 (7th Cir. 1979)	9, 22, 24
Stump v. Sparkman, 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978)	5, 9, 11, 15, 17, 18, 20, 21, 22
Sykes v. California Department of Motor Vehicles, 497 F.2d 197 (9th Cir. 1974)	22
Tenney v. Brandhove, 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951)	19
United States v. Price, 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966)	23, 24

CASES

Page

Waits v. McGowan, 516 F.2d 203 (3rd Cir. 1975) 16, 21
Winslow v. Duval County Ranch Company, 519 S.W.2d 217 (Tex. Civ. App. 1975—Beaumont, writ ref'd n.r.e.) 3, 19

UNITED STATES STATUTES

18 U.S.C.A. Section 242 24
28 U.S.C. Section 1254(1) 2
42 U.S.C. Section 1983 .....cited throughout

TEXAS CONSTITUTION

Article XVI, Section 14 28

TEXAS PENAL CODE

Section 36.02 28

IN THE

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Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court's memorandum order is unreported. It appears in the Appendix in the Petition for Writ of Certiorari, at Page A1 (hereinafter referred to as the "Petition Appendix", to distinguish it from the separate Appendix filed herewith).

The first opinion of the Court of Appeals, the per curiam panel opinion, is reported at 588 F.2d 124, and appears in the Petition Appendix at Page A5. The opinion of the Court of Appeals on rehearing en banc is reported at 604 F.2d 976 and appears in the Petition Appendix at Page A11.

JURISDICTION

The judgment of the Court of Appeals on rehearing en banc was entered on October 22, 1979, and appears in the Petition Appendix at A41. The order of the Court of Appeals denying the Petition for Rehearing and Suggestion for Rehearing En Banc of Appellee, Orville E. Dennis (Petitioner herein) appears in the Petition Appendix at Page A43. The Petition for Writ of Certiorari was filed on February 1, 1980, and granted on March 24, 1980. The jurisdiction of this Court rests upon 28 United States Code, Section 1254(1).

STATUTE INVOLVED

The federal statute involved is Title 42, United States Code, Section 1983 [Act of April 20, 1871, Chapter 22, Section 1, 17 Stat. 13], which reads as follows:

> "Sec. 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTION PRESENTED

Whether a private citizen can be liable for damages under Title 42, United States Code, Section 1983, when he is an alleged co-conspirator with a state court judge who is immune from the Section 1983 claim under the doctrine of judicial immunity.

STATEMENT

In the District Court below, the Respondents allege that a Texas state district court judge, O. P. Carrillo, conspired with certain private individuals, Duval County Ranch Company, Clinton Manges, Clarence Martens and Petitioner, Orville E. Dennis, to deprive Respondents of their civil rights. The complaint for damages was brought under 42 United States Code, Section 1983 (hereinafter referred to as "Section 1983").

In the Respondents' "First Amended Complaint" (A. 6), the alleged conspiracy is described as involving the conduct of Duval County Ranch Company in suing the Respondents in state district court to wrongfully enjoin the Respondents from certain activity on an oil and gas lease, the judge's entry of a temporary injunction, and Martens' and Petitioner's signing as individual sureties on the bond required under state law for issuance of the temporary injunction. The temporary injunction was dissolved on appeal to a Texas appellate court. *Winslow v. Duval County Ranch Company,* 519 S.W.2d 217 (Tex. Civ. App. 1975—Beaumont, writ ref'd n.r.e.).

The only allegations contained in the First Amended Complaint as to Petitioner are the conclusory allegation that Petitioner "knew" about a conspiracy among the judge, Manges and Duval County Ranch Company to

wrongfully injure the Respondents, and that Petitioner had participated in that conspiracy by signing the temporary injunction bond as an individual surety.

The District Court below, on motions to dismiss submitted by Petitioner and the other defendants below, dismissed the amended complaint against all defendants. The District Court in its memorandum order premised the dismissal upon the state court judge's immunity from suit under Section 1983 (see Petition Appendix, A1).

The District Court found that the state judge's action of entering the injunction was a judicial act within his authority and jurisdiction. The District Court reasoned that, but for the entry of the injunction by the state judge, the Respondents would not have suffered the alleged injury.

Assuming the allegations in the amended complaint to be true for purposes of the hearing on motions to dismiss, the District Court below found that the state judge participated in the alleged conspiracy in his role as judge. His action in the conspiracy, that is, entering the injunction, was a judicial act within his authority and jurisdiction. Thus, the District Court held, the state judge is immune from liability under Section 1983.

As to the complaint against the Petitioner and the other private alleged co-conspirators, the District Court held that a valid claim could not be stated against them under Section 1983. Because of the judge's immunity from suit, the other defendants had not conspired with a state officer against whom a valid claim could be stated under Section 1983.

By per curiam opinion dated January 17, 1979, a three judge panel of the Court of Appeals for the Fifth Circuit,

the Honorable Judges Wisdom, Godbold and Tjoflat, affirmed the trial court's dismissal of the complaint against both the state court judge and the private citizen defendants, including Petitioner (see Petition Appendix, A5). In that opinion, the Court of Appeals affirmed the dismissal of the complaint under the doctrine of judicial immunity as applied to Section 1983 cases.

With respect to the private citizen defendants, including this Petitioner, the Fifth Circuit Panel held that the private citizens, in allegedly conspiring with a state judge, did not conspire with a person against whom a claim valid under Section 1983 could be stated, and thus themselves were entitled to dismissal of claims made against them under that statute.

No petition for rehearing was filed. However, on March 9, 1979, notice was given by the clerk of the Court of Appeals of the entry of an order by a then majority of judges in active service, on the Court's own motion, to rehear the cause by the Court en banc with oral argument. Through its clerk, the appeals court below notified Petitioner and the other parties of its intent to reconsider en banc the holding of the panel affirming the dismissal of the complaint as to the private alleged co-conspirators. The clerk's notice referred specifically to footnote number 13 in the opinion of this Court in *Stump v. Sparkman,* 435 U.S. 349, at 364, 55 L.Ed.2d 331, at 344, 98 S.Ct. 1099 (1978).

The cause was submitted on rehearing to the Court of Appeals en banc on June 5, 1979. By opinion dated October 22, 1979, by a ten to four decision, the Court of Appeals affirmed the panel's holding that the state court judge was immune from suit, but reversed as to

the private alleged co-conspirators (Petition Appendix, A11).

The majority in the en banc opinion on rehearing reasoned that, even though the state court judge is immune from suit under Section 1983, his participation in the alleged conspiracy, that is, his granting the temporary injunction, still gave the alleged conspiracy the requisite action under color of state law. Since the conspiracy had the requisite state action, a claim could be maintained under Section 1983 against the private citizen alleged co-conspirators.

Judgment on Rehearing en Banc was entered on October 22, 1979, affirming the dismissal of the judge, but reversing and remanding as to Petitioner and the other private citizen "conspirators" (Petition Appendix, A41). This Petitioner filed a petition for rehearing and suggestion for rehearing en banc on November 5, 1979, which was overruled by order of the Court of Appeals entered on December 14, 1979 (Petition Appendix, A43). Upon Petitioner's motion for stay of issuance of mandate, the Court of Appeals stayed the mandate until February 1, 1980.

The Petition for Writ of Certiorari was filed on February 1, 1980, and granted by this Court on March 24, 1980.

SUMMARY OF ARGUMENT

Judicial immunity involves more than a judge's immunity from liability for civil damages. The doctrine of judicial immunity requires that a judge be protected from apprehension of any personal consequences. The purpose

of the doctrine is to further the public interest in a free and independent judiciary.

The decision by the majority of the court of appeals below erodes the doctrine of judicial immunity. By permitting prosecution of claims under Section 1983 against private individuals who have allegedly conspired with a judge, the court of appeals exposes judges indirectly to the harms sought to be avoided by the doctrine of judicial immunity.

It is Petitioner's position that the opinion of the majority of the court of appeals below is contrary to the public interest sought to be furthered by the doctrine of judicial immunity as applied by this court in Section 1983 cases. Furthermore, the decision below conflicts with the established rule followed by a majority of the circuit courts of appeals which have considered the issue, and that the majority rule furthers the public interest, whereas the minority rule followed by the court below frustrates that public interest.

I.

INTRODUCTION

Narrowly stated, the question presented for review is whether the scope of the doctrine of judicial immunity is limited to shielding judges from personal liability for damage claims, or whether the doctrine has a broader purpose of shielding judges altogether from the threat of involvement, whether direct or indirect, in litigation brought by unsatisfied litigants. The decision of the court of appeals below restricts the scope of judicial immunity, and would allow to occur indirectly most of the harms sought to be avoided by the doctrine of judicial immunity.

II.

PUBLIC POLICY BEHIND THE DOCTRINE OF JUDICIAL IMMUNITY.

At least since *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872), this Court has recognized that the public interest is best served by protecting judges from lawsuits complaining of their judicial decisions. The purpose of judicial immunity is to enable judges to function without being subjected to personal consequences. The public interest to be served by judicial immunity is to allow a judge the freedom to act upon his own convictions and without compromising his judicial independence. The doctrine of judicial immunity is intended to do more than merely immunize a judge from personal liability for money damages.

III.

THE DOCTRINE IS NOT QUALIFIED BY THE JUDGE'S MOTIVES.

Equally well established within the doctrine of judicial immunity is that the scope of judicial immunity is intended to encompass even judicial acts motivated by malice and corruption. The applicability of judicial immunity should not depend upon the judge's motives behind his judicial acts.

IV.

APPLICABILITY OF THE DOCTRINE DEPENDS UPON EXISTENCE OF JURISDICTION.

Also established is that the doctrine applies only where the judge has acted within his jurisdiction and not in

clear absence of any jurisdiction. It is uncontroverted that the subject judge, Carrillo, was acting within his state court jurisdiction when he entered the temporary injunction about which the Respondents complain.

V.

THE DOCTRINE IS APPLICABLE TO SECTION 1983 CASES.

In enacting Section 1983, Congress did not intend to abolish all common law immunities. This Court has held that the doctrine of judicial immunity, as well as that of legislative immunity, is applicable in Section 1983 cases.

VI.

SECTION 1983 AND PRIVATE PERSONS.

A complaint under Section 1983 can be maintained against private persons only in the event it can be shown that those persons conspired with a state official in achieving the injury of which the Plaintiffs complain. Without the state official, no cause of action exists under Section 1983 against private persons.

VII.

A JUDGE IS NOT A "PERSON" UNDER SECTION 1983.

The implication from this Court's holdings in *Pierson v. Ray,* 386 U.S. 547 (1967) and *Stump v. Sparkman,* 435 U.S. 349 (1978) is that, because of the applicability of the doctrine of judicial immunity, a judge acting

within his jurisdiction is not a "person" as that term is used in Section 1983. Therefore, any private individuals who are alleged to have conspired with that judge are likewise excluded from the ambit of Section 1983 because they did not conspire with a "person" against whom a valid claim could be stated under Section 1983.

VIII.

THE MAJORITY RULE IN THE CIRCUIT COURTS.

The majority of the courts of appeals which have considered the issue presented is that no cause of action can be stated under Section 1983 against a private citizen who has allegedly conspired with a state court judge who is himself immune from prosecution under Section 1983 because of the doctrine of judicial immunity.

IX.

THE MINORITY RULE IN THE CIRCUIT COURTS.

Until the lower court changed its position, the only other circuit to deviate from the majority rule was the First Circuit in *Kermit Construction Corp. v. Banco Credito y Ahorro Ponceno,* 546 F.2d 1 (1976). Perhaps the Seventh Circuit deviated from the majority rule last year in *Sparkman v. McFarland,* 601 F.2d 261 (7th Cir. 1979). However, this is questionable because of the highly fractioned en banc opinion. The *Kermit* decision is distinguishable from the instant case because it did not involve a judge as a conspirator, and the court in *Kermit* relied upon other case authority which also did not involve a judge as a conspirator.

X.

EROSION OF THE DOCTRINE BY COLLATERAL ATTACK.

The opinion of the majority of the court of appeals below challenges the public policy behind the doctrine of judicial immunity. The court below would restrict the scope of the doctrine of judicial immunity to merely immunizing a judge from direct suit for money damages. However, the scope of the doctrine, as described by this Court in its opinion in *Bradley, Pierson* and *Stump* is much broader than that. The purpose of the doctrine is to ensure a judge's freedom from apprehension of personal consequences to himself in exercising his authority as a judge within his jurisdiction. The purpose behind the doctrine requires that collateral attack, focusing on the judge's judicial role, also be avoided. Any other result would compromise the absoluteness of the doctrine of judicial immunity.

XI.

BALANCING THE RELATIVE HARMS.

The Respondents have state court remedies against the Petitioner and the other alleged private co-conspirators. To permit the Respondents to pursue Petitioner and the other private alleged co-conspirators under a Section 1983 claim in federal court is to allow the Respondents a cumulative remedy, at the expense of the doctrine of judicial immunity.

By allowing the prosecution of a Section 1983 claim against the private alleged co-conspirators only, the court below has necessarily insured the involvement of the

judge, whether direct or indirect. To establish their complaint under Section 1983, the Respondents must plead and prove that the judge participated in the conspiracy and that his motives were non-judicial. The existence of the lawsuit provides the intimidation and harassment sought to be avoided by the doctrine of judicial immunity.

The judge becomes a principal witness in the Section 1983 lawsuit against the private alleged co-conspirators. The judge is subjected to discovery procedures and pretrial practices. He may even have to testify and be required to explain his conduct, motives and sincerity to another judge and jury.

This involvement of the judge, whether as a witness or collaterally by his action being made the focus of the case, calls into question his integrity as a judge. The judge may be forced to waive his immunity and enter the case voluntarily in order to defend himself, his honor and his integrity.

It is not in the public interest that a remedy be provided in federal court for any litigant dissatisfied with the result of litigation in a state court, by merely alleging a conspiracy sufficient to obtain federal court review of his claim.

The ability to prosecute a Section 1983 claim against a private person because of his involvement with a judge in a judicial proceeding can only discourage and penalize private persons for seeking the aid or judicial approval of a court.

The past and present experiences of the federal court demonstrate the willingness of litigants, "jailhouse law-

yers" and others to challenge the motives of their judges through filing Section 1983 lawsuits in federal court.

On balance, the public interest is best served by preserving intact an absolute doctrine of judicial immunity—absolute in the sense of barring suit directly against the judge, and absolute in the sense of barring suit against private persons where the alleged injury stems from a judge's judicial act within his jurisdiction.

ARGUMENT

I.

INTRODUCTION

Presented here is an issue of law involving one aspect of the doctrine of judicial immunity in Section 1983 cases. Is the scope of the doctrine limited to shielding judges from personal liability for damage claims? Or, is the doctrine intended to shield judges altogether from the threat of involvement, whether direct or indirect, in litigation brought by unsatisfied litigants?

It is suggested that the interest of the public is best served if the doctrine of judicial immunity avoids any involvement of a judge in any litigation under Section 1983 which questions the judge's motives. If the doctrine is intended to serve this broader purpose, then the decision of the court of appeals would erode the efficacy of the doctrine. By its decision on rehearing en banc, the court of appeals would allow to occur indirectly most of the harms sought to be avoided by the doctrine of judicial immunity.

II.

PUBLIC POLICY BEHIND THE DOCTRINE OF JUDICIAL IMMUNITY.

It was long ago recognized by this Court that it was in the public interest to protect judges from lawsuits brought complaining of their judicial decisions. *Bradley v. Fisher,* 80 U.S. (13 Wall.) 335, 20 L.Ed. 646 (1872). This landmark decision emphasized that the concept of judicial immunity is important to preserve our system of jurisprudence. It is imperative that judges be immune from prosecution for their acts as judges. This Court emphasized in *Bradley v. Fisher, supra,* that the doctrine of judicial immunity is based upon sound public policy:

> "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of his freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility . . .
>
> "Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry . . ." *Bradley v. Fisher,* 80 U.S. at 347, 20 L.Ed. at 649-650.

Quoting from the case of *Floyd and Barker,* reported by Coke in 1608 (12 Coke 25), this Court in *Bradley*

noted that if judges were subject to being questioned for their motives in their decisions as judges, such would "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations." *Bradley,* 80 U.S. at 348, 20 L.Ed. at 640.

Moreover, in this Court's landmark decision in *Pierson v. Ray,* 386 U.S. 547, 18 L.Ed.2d 288, 87 S.Ct. 1213 (1967), this Court reiterated and reaffirmed its recognition of the importance of the doctrine of judicial immunity. This Court stated:

> "It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray,* 386 U.S. at 554, 18 L.Ed. 2d at 294-295.

Furthermore, this Court recently reaffirmed its recognition of the importance of judicial immunity in *Stump v. Sparkman,* 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978). Simply stated, this Court has consistently upheld the doctrine of judicial immunity and has given it effect in the cases involving the issue.

The Circuit Courts of Appeals recognize the importance and applicability of the doctrine of judicial immunity. These Circuit Courts of Appeals emphasize that judges are absolutely immune to civil damage suits for judicial

acts done within their jurisdiction. *Waits v. McGowan,* 516 F.2d 203 (3rd Cir. 1975); *Fowler v. Alexander,* 478 F.2d 694 (4th Cir. 1973); *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970); *Perez v. Borchers,* 567 F.2d 285 (5th Cir. 1978) cert. den. 99 S.Ct. 109; *Kurz v. State of Michigan,* 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972, U.S. reh. den. 98 S.Ct. 1289; *Brown v. Dunne,* 400 F.2d 341 (7th Cir. 1969); *Hansen v. Ahlgrimm,* 520 F.2d 768 (7th Cir. 1975); *Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974); *Haldane v. Chagnon,* 345 F.2d 601 (9th Cir. 1965); *Franklin v. Meredith,* 386 F.2d 958 (10th Cir. 1967). The Ninth Circuit Court of Appeals in *Gregory v. Thompson, supra,* appropriately described the judicial system's consistent recognition of the doctrine of judicial immunity when it said that the doctrine is "a seemingly impregnable fortress in American jurisprudence . . ." *Gregory v. Thompson,* 500 F.2d at 62.

It appears that the doctrine of judicial immunity is essential for the proper administration of justice and the consistent adherence to such a principle bears out its importance.

III.

THE DOCTRINE IS NOT QUALIFIED BY THE JUDGE'S MOTIVES.

Applicability of judicial immunity is not determined by the judge's motives behind his judicial acts. The scope of judicial immunity is intended to encompass even judicial acts motivated by malice and corruption. In *Bradley v. Fisher, supra,* this Court explicitly stated that "judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such

acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." 13 Wall. at 351, 20 L.Ed. at 651.

In *Pierson v. Ray, supra,* this Court again explained that judicial immunity applies even if a judge is accused of acting corruptly. This Court said that:

> "This immunity applies even where the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." 386 U.S. at 554, 18 L.Ed.2d at 294.

Moreover, in *Stump v. Sparkman, supra,* this Court clearly explained that a judge will not be deprived of immunity because the action he took was done maliciously. In discussing the inclusion of malice and corruption within the scope of judicial immunity, this Court stated in *Stump v. Sparkman* that:

> "Even earlier, in *Randall v. Brigham,* 7 Wall 523, 19 L.Ed. 285 (1869), the Court stated that judges are not responsible 'to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly.' Id. at 537, 19 L.Ed. 285. In *Bradley* the Court reconsidered that earlier statement and concluded that 'the qualifying words used were not necessary to a correct statement of law . . .' *Bradley v. Fisher,* 13 Wall 335, 351, 20 L.Ed. 646 (1872)." 435 U.S. at 355, 55 L.Ed.2d at 338, footnote 5.

In an opinion subsequent to that in *Stump,* this Court reiterated that to insure the public interest in a fearless judiciary is served, the doctrine immunizes judges from civil lawsuits concerning the motives behind their decisions. *Butz v. Economou,* 438 U.S. 478, 57 L.Ed.2d 895, 98 S.Ct. 2894 (1978).

IV.

APPLICABILITY OF THE DOCTRINE DEPENDS UPON THE EXISTENCE OF JURISDICTION.

As a general statement about the doctrine of judicial immunity, for the doctrine to apply, the judge must have acted within his jurisdiction and not in clear absence of any jurisdiction. *Stump,* 435 U.S. at 356-357. A distinction should be made here between an act "in excess of jurisdiction" and an act "in clear absence of all jurisdiction." Judges are immune from suit for judicial acts done within or "in excess of" their jurisdiction, even if those acts have been done maliciously or corruptly. *Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974).

It is uncontroverted that the defendant trial judge acted within his state court jurisdiction. In their First Amended Complaint, the Respondents assert that "the recovery of 13,000 barrels of crude oil was lost as a result of the temporary injunction, since other operators producing oil from the same reservoir were not similarly enjoined." It is clear that Respondents' complaints are directed toward the order signed by Judge Carrillo, temporarily enjoining production of oil from land leased in Duval County. Even if erroneous, Carrillo's act in entering this judgment was a judicial act. The order could not have been entered in any other capacity other than in Carrillo's judicial capacity.

In *Winslow v. Duval County Ranch Company,* 519 S.W.2d 217 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.), the Texas appellate court, in reviewing Carrillo's actions in granting the temporary injunction, held that he "abused his direction." 519 S.W.2d at 224. The Texas Court did not hold that Carrillo was without jurisdiction.

In order to exercise discretion, a judge would have to have jurisdiction over the parties and subject matter and be able to enter the order which he did. Therefore, Carrillo's act in entering the order granting the temporary injunction was not "in absence of all jurisdiction."

Without such order or act (the injunction) Respondents would not have sustained the "alleged" injury nor would there be anything of which to complain. Therefore, the injurious act complained of was a judicial act, clearly done in Judge Carrillo's judicial capacity and within the Judge's jurisdiction. His subject conduct falls within the scope of judicial immunity. The court of appeals below correctly held that the judge was immune from the Section 1983 complaint.

V.

THE DOCTRINE IS APPLICABLE TO SECTION 1983 CASES.

This Court has concluded that the legislative record for Section 1983 gives no clear indication that Congress meant to abolish all common-law immunities. In *Tenney v. Brandhove,* 341 U.S. 367, 95 L.Ed. 1019, 71 S.Ct. 783 (1951), this Court held that legislative immunity was applicable in Section 1983 cases. In *Pierson,* it held

that the doctrine of judicial immunity is applicable in Section 1983 cases. *Pierson, supra,* 386 U.S. at 554-555; *Stump, supra,* 435 U.S. at 356.

VI.

SECTION 1983 AND PRIVATE PERSONS.

How can Section 1983 apply to private persons, like Petitioner, when the state actor is immune?

Section 1983 makes no mention about private persons acting alone, nor about conspiracies between private citizens and state officials. It is settled that a private individual, acting alone, is not liable for damages under Section 1983. *Slavin v. Curry,* 575 F.2d 1256 (5th Cir. 1978). However, this Court has construed Section 1983 to encompass a conspiracy involving a private person and state officials if the private person was a "willful participant" in a conspiracy with agents or officials of the state. *Adickes v. Kress & Company,* 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1598 (1970).

However, *Adickes* did not involve a judge. It involved policemen and the policeman's qualified immunity. Petitioner submits that the result should be different here because of the absolute nature of judicial immunity which derives from the underlying public policy.

VII.

A JUDGE IS NOT A "PERSON" UNDER SECTION 1983.

A judge acting within his jurisdiction is not a "person" as that word is used in Section 1983. It is submitted that this is the implication from this Court's holdings in

Pierson and *Stump*. This is the conclusion of Justice Douglas in his dissent in *Pierson*. 386 U.S. at 559.

The concept that judges are not "persons" under Section 1983 provides the rationale for the subject majority rule in the circuit courts. If the state actor is an immune judge, the private persons alleged to have conspired with the judge to deprive the complainant of his civil rights cannot be prosecuted under Section 1983. Such persons did not conspire with a "person" against whom a valid complaint could be stated under Section 1983.

VIII.

THE MAJORITY RULE IN THE CIRCUIT COURTS.

In a majority of the courts of appeals which have considered the issue here, the rule is and has been that no cause of action can be stated under Section 1983 against a private citizen who has allegedly conspired with a state court judge who is himself immune from prosecution under Section 1983 because of the doctrine of judicial immunity. The rule has been followed by the Third Circuit in *Hazo v. Geltz,* 537 F.2d 747 (3rd Cir. 1976), *Waits v. McGowan,* 516 F.2d 203 (3rd Cir. 1975) and *Bauers v. Heisel,* 361 F.2d 581 (3rd Cir. 1966) cert. den. 386 U.S. 1021; by the Fourth Circuit in *Fowler v. Alexander,* 478 F.2d 694 (4th Cir. 1973); by the Sixth Circuit in *Kurz v. State of Michigan,* 548 F.2d 172 (6th Cir. 1977) cert. den. 434 U.S. 972, U.S. reh. den. 98 S.Ct. 1289; by the Seventh Circuit in *Hansen v. Ahlgrimm,* 520 F.2d 768 (7th Cir. 1975), *French v. Corrigan,* 432 F.2d 1211 (7th Cir. 1970) cert. den. 401 U.S. 915, and *Brown v. Dunne,* 409 F.2d 341 (7th Cir. 1969); and by the Ninth Circuit in *Haldane v.*

Chagnon, 345 F.2d 601 (9th Cir. 1965), *Sykes v. California Department of Motor Vehicles,* 497 F.2d 197 (9th Cir. 1974), and *Birley v. California,* 564 F.2d 849 (9th Cir. 1977).

In the Second Circuit, this majority rule was followed in *Russell v. Town of Mamoroneck,* 440 F. Supp. 607 (S.D.N.Y. 1977) and *Rhodes v. Laurino,* 444 F. Supp. 170 (E.D.N.Y. 1978).

The majority rule had been followed by the Fifth Circuit for a decade: *Guedry v. Ford,* 431 F.2d 660 (5th Cir. 1970); *Hill v. McClellan,* 490 F.2d 859 (5th Cir. 1974); *Humble v. Foreman,* 563 F.2d 780 (5th Cir. 1977); *Perez v. Borchers,* 567 F.2d 285 (5th Cir. 1978), cert. den. 99 S.Ct. 109; *Slavin v. Curry,* 575 F.2d 1256 (5th Cir. 1978).

IX.

THE MINORITY RULE IN THE CIRCUIT COURTS.

After this Court's decision in *Stump v. Sparkman, supra,* the subject issue of whether a claim can be stated against the co-conspirators was submitted on remand to the Seventh Circuit in *Sparkman v. McFarland,* 601 F.2d 261 (7th Cir. 1979). As the dissent in the opinion below notes, the position of the Seventh Circuit is now unclear because of the highly fractionated en banc opinion in *Sparkman v. McFarland.*

The en banc opinion in *Sparkman v. McFarland* consists of a per curiam order and four concurring opinions. The Court of Appeals for the Seventh Circuit affirmed the district court's dismissal of the Section 1983 conspiracy claim against the private defendants after the state judge

was held to be immune. Two judges were of the opinion that the issue was not properly before the court. Three judges would allow Section 1983 suits even when the state actor is immune, but they would impose on the plaintiff the burden of a particularized pleading requirement.

Until the decision below on rehearing, the First Circuit stood alone as having squarely met the subject issue and having allowed the Section 1983 claim against the private conspirators. It was the exception among the circuit courts of appeals. *Kermit Construction Corp. v. Banco Credito y Ahorro Ponceno,* 546 F.2d 1 (1976). In *Kermit* the court attempted to premise its holding on this Court's opinion in *United States v. Price,* 383 U.S. 787, 16 L.Ed.2d 267, 86 S.Ct. 1152 (1966). The court reasoned that, immune or not, the state official provided the requisite state action. Anyone conspiring with that state official was therefore acting under color of state law. *Kermit,* 547 F.2d at 3.

Kermit does not even involve a state judge. *Kermit* involved a Section 1983 action brought against a bank, a construction corporation, and a court-appointed receiver. It was alleged that all of the defendants conspired to put the corporation into receivership and avoid paying a debt to the appellant. The court explained that the receiver should share a judge's judicial immunity. The court further held that the remaining private defendants could not "seek shelter of judicial immunity" even though the receiver was himself immune.

In regard to *United States v. Price, supra,* the only authority cited by *Kermit,* it is distinguishable from the instant case in several respects. It did not involve a judge

as an alleged co-conspirator. It did not involve the effect of judicial immunity on the liability of private co-conspirators under Section 1983. Instead, it involved 18 U.S.C.A. Section 242, a criminal statute. However, the Supreme Court refers to Section 1983 as the civil counterpart to said Section 242. And finally, *Price* involves outrageous and criminal conduct, clearly outside the scope of any acknowledged immunity, i.e. murder.

X.

EROSION OF THE DOCTRINE BY COLLATERAL ATTACK.

Like some of the opinions of the Seventh Circuit in *Sparkman v. McFarland,* but unlike the opinion of the First Circuit in *Kermit,* the majority opinion of the court of appeals below challenges the public policy behind the doctrine of judicial immunity.

The majority of the court of appeals below in the opinion on rehearing en banc would restrict the scope of the doctrine of judicial immunity to merely immunizing a judge from direct suit for money damages. It is submitted that the doctrine of judicial immunity, as described by this Court in its opinions in *Bradley, Pierson,* and *Stump* is intended to do more than merely immunize a judge from personal liability for money damages.

As enunciated in *Bradley,* the public policy requires that a judge be free to make decisions within his jurisdiction "without apprehension of personal consequences to himself". *Bradley,* 80 U.S. at 347. This Court did not restrict the phrase ". . . personal consequences . . ." to a judge's personal liability for damages.

Should the doctrine of judicial immunity be narrowly construed to prohibit only direct suit against a judge, yet allow a suit against the private co-conspirators in which the judge's motives and conduct would be in question? Petitioner submits that this Court has given a broader meaning to a judge's immunity. To re-quote a portion of the opinion in *Pierson,* the Court said:

> "His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making, but to intimidation." *Pierson,* 386 U.S. at 554, 18 L.Ed. 2d at 294-295.

Contrary to the narrow construction given the doctrine by the majority of the court below, the doctrine has been construed to bar more than liability for money damages. It bars the trial itself. The doctrine is not merely a defense to be raised by a judge at trial. According to Judge Learned Hand, this is justified, because

> ". . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949).

Again quoting from this Court's opinion in *Pierson*:

> "This immunity . . . 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the

> judges should be at liberty to exercise their function with independence and without fear of consequences.' " (citations omitted). *Pierson,* 386 U.S. at 554, 87 S.Ct. at 1218, 18 L.Ed. at 294.

The majority below has misconstrued the scope of the doctrine. They would have us believe that the harassment and intimidation to be avoided arises only out of a direct suit against a judge. But what of a suit against persons with whom the judge is alleged to have conspired?

XI.

BALANCING THE RELATIVE HARMS.

Those who would permit the prosecution of Section 1983 claims against private persons alleged to have conspired with judges reason that the judges' cloak of immunity should not shield guilty private co-conspirators. They would limit the scope of the doctrine to merely immunizing judges from personal liability for civil damages.

But as stated above, it appears that the doctrine, as developed in opinions of this Court, goes much further. The doctrine is intended to further the independence of the judiciary and protect judges from the intimidation and harassment growing out of judges' involvement or participation in litigation brought by disgruntled litigants.

It is recognized that the doctrine may shield a few dishonest judges from liability, but without the doctrine the independence of the judiciary is compromised. A balancing of conflicting public interests is required. It is submitted that the same balancing is applicable in considering the harms arising from the minority rule espoused by the majority in the court below.

An appropriate introduction to this concept of balancing conflicting public interests is a passage from Judge Learned Hand's opinion in *Gregoire v. Biddle, supra,* a portion of which is quoted earlier in this brief:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. Judged as res nova, we should not hesitate to follow the path laid down in the books." *Gregoire,* 177 F.2d at 581.

Just as with a lawsuit against the judge, a lawsuit against his alleged co-conspirators will expose his motives, his honor and his integrity to the risks of the outcome. Not until the case is tried will it be known whether the allegations involving the judge's conduct were well founded or not.

What is the harm resulting from the majority rule? It is that the Respondents would be deprived of a remedy under federal law now provided by Section 1983 which is cumulative of remedies available to them under Texas law.

There are both criminal and civil remedies provided under Texas law for the complaint alleged by Respondents against Petitioner and the other alleged co-conspirators. In Texas, persons injured by the wrongful issuance of an injunction can sue the private "conspirators" for damages. As a matter of fact, that is exactly what the Respondents have done. They have now pending a suit seeking pecuniary damages in the 229th Judicial Dis-District Court in Duval County, Texas: Cause No. 9524, "Sidney A. Sparks, Trustee vs. Duval County Ranch Co., et al."

Also, Respondents have now pending a suit on the temporary injunction bond which Petitioner signed as surety. That suit is Cause No. 78-5045E in the 148th Judicial District Court of Nueces County, Texas.

There are criminal sanctions under Texas law for the kind of conduct alleged against the private individuals, involving bribery of a state official. Tex. Const. Art. XVI, Section 14; Tex. Penal Code, Section 36.02.

What are the harms from the minority rule espoused by the court below? Essentially, the minority rule per-

mits a collateral attack on the judge's action. It permits indirectly what the doctrine of judicial immunity prohibits. See the dissent below, 604 F.2d at 984; Petition Appendix, A28.

First, the judge's involvement is unavoidable in a Section 1983 claim brought against only the private co-conspirators. To establish the plaintiff's case against the defendants, the plaintiff must raise the issue of the judge's alleged participation, his actions and motives. He must show that the judge participated in the conspiracy to deprive him of his civil rights. He must prove the judge's participation in order to establish the requisite state action under Section 1983.

Even though the plaintiff cannot directly force the judge to participate by making him a defendant, the plaintiff can intimidate and harass the judge merely by being able to bring the lawsuit under Section 1983 against others involved in the state court case.

Second, if judicial immunity protects the judge but suit is permitted against his alleged co-conspirators, the judge becomes the primary and principal witness for the defense against all charges brought against the co-conspirators. The unprotected co-conspirator may have to build his case around the testimony and statements of the involved judge. For an effective defense, the plaintiffs and the alleged co-conspirators will be compelled to subject the judge to certain discovery procedures and pre-trial practices so that all facts and legal issues can be developed. The judge might be subjected to testifying in trial and being required to explain his conduct, motives and sincerity to another judge and jury. Such actions will require a judge to become involved in the

co-conspirator's defense and such actions will cause the judge to be diverted from his judicial position and responsibilities.

Is this what the public interest demands? Absolutely not. The public interest demands that a judge be free to act upon his own convictions without liability, fear or duty to answer to every person who feels aggrieved by the action or involvement of a judge. This Court stated in *Bradley v. Fisher, supra,* that "the public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent them from being harassed by vexatious actions." 80 U.S. at 349.

Third, the possibility of a judge being involved in the defense or prosecution of a private person on alleged conspiracy charges and the possibility of a judge being required to testify in such matters cause to be focused upon his judicial integrity. If there is anything the public demands and a judge should honor, it is his integrity as a judge and the effect of his integrity upon the judicial system as a whole. The public demands that a judge avoid evil or even the appearance of it. Yet, how can he maintain such integrity when he can still be made to submit to discovery, testify at trial and have his honor questioned. Unless the judge voluntarily enters the lawsuit as a defendant and waives his right of judicial immunity, he has no right to quetsion his accusers. He is not even assured the right to remain in the courtroom to hear the testimony of the witnesses. To defend himself, his name, his honor, and his integrity, the judge is forced to waive his immunity or to enter the case voluntarily as a defendant. If this occurs, then the very rationale

for the doctrine of judicial immunity has been undercut. As stated by this Court in *Bradley,* if a judge could be compelled to answer for his judicial acts, then his office and usefulness would be destroyed.

Fourth, public policy requires that the door to federal court not be opened wide to every aggrieved litigant in a state court proceeding. Anyone dissatisfied with the result of the litigation in a state court can allege a conspiracy sufficient to obtain federal court review of his claim. Every trial in a state court, criminal or civil, carries the potential for a claim that the judge and other participants in the proceeding acted in knowing concert to deny federal rights. In this way, the judicial system can be abused and the opportunities for continually involving the judge in such litigation can effectively prevent the judge from exercising his responsibilities as a judicial officer.

Fifth, private persons should not be discouraged from or penalized for seeking the aid or judicial approval of a court before getting involved in certain legal activities. This is very important since it can be presumed that if the action is unconstitutional, the judge will be more likely to prevent it than the individual engaging in self-help will be to refrain from engaging in it. If the seeking of aid from a judicial officer is ever challenged as a conspiracy, then the seeking of aid or assistance from the judiciary by private persons will be stifled and discouraged because of the unavailability of judicial immunity protection. This certainly runs in opposition to the public's interest and needs.

As indicated, there exists imperative public policy reasons for the majority rule in the circuit courts that pros-

ecution of a claim under Section 1983 should not be permitted against a private citizen when he or she is alleged to be a co-conspirator with a judge who is immune from such actions as a Section 1983 claim. Although this rule may result in protecting a guilty party from the federal claim, on balance the rule serves a greater purpose—the purpose served by the doctrine of judicial immunity. The minority rule will totally frustrate that purpose and the public interest.

To say that the consequences of allowing prosecution of suits against the alleged co-conspirators will be inconsequential is contradicted by the lower court's knowledge of the many "jailhouse lawyer" lawsuits and writs filed with the federal district courts and with the Fifth Circuit itself. The present burden of these suits was noted by the attorneys and by the members of the lower court during the panel argument and the argument on rehearing.

One need only consider the number of reported cases under Section 1983 involving judges of various jurisdictions, criminal and civil, judges who allegedly acted with improper motives and judges who have allegedly grievously erred. Disgruntled litigants have not been reluctant to try to take on their judges through the vehicle of a Section 1983 suit in federal court.

It is respectfully submitted that the majority rule is the proper resolution of the issue, and that this Court should clarify the rationale for the majority rule.

CONCLUSION

For the reasons set forth above, Petitioner Orville E. Dennis, prays that this Court reverse the judgment below insofar as it reverses the district court's dismissal of the complaint against Petitioner and the other defendants below, and that this Court affirm the judgment of the district court below dismissing the complaint against this Petitioner and the other defendants below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for the Petitioner have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to the counsel of record for the Respondents, as follows: Mr. Garland Smith, P.O. Drawer 1104, Weslaco, Texas 78596 on the ____ day of May, 1980.

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IN THE

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OCTOBER TERM 1979

NO. 79-1186

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Petitioner

v.

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d/b/a SIDNEY SPARKS, TRUSTEE,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE
List of Authorities	iii
Brief of Respondents	1
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
U.S. Constitution, Article II, Section 4	2
Texas Constitution, Article XVI, Section 41 ..	3
Texas Constitution, Article V, Section 11	3
Texas Constitution, Article V, Section 1a	4
Texas Constitution, Article XV, Section 4	6
42 United States Code, Section 1983	7
Question Presented	7
Statement of the Case	8
Answer to Petitioner's Summary of Argument	11
Argument in Reply	14
I. Public Policy Supports the En Banc Decision	14
A. Bribery, the Ultimate Judicial Corruption, Is Here Involved	14

PAGE

B. Public Policy Is Designed to Preserve Independence of Honorable Judges; Not to Conceal Corruption in the Judiciary 15

C. Pierson v. Ray Did Not Accord Immunity to Private Persons 17

D. Conflict of Circuits on Derivative Immunity 18

E. Public Policy and Logic Support the En Banc Decision 20

II. Balancing of Evils Favors En Banc Ruling 24

A. Inconvenience to Judges Does Not Exceed Basic Requirements of Citizenship 24

B. Public Policy Supporting Immunity of Judges Does Not Apply to Private Parties 26

1. Petitioners' (and Amicus) Arguments Are Based on Two False Presumptions 27

2. Answer to Florida's Contention Re: Guardians Ad Litem, Etc. 31

III. Remedies Available in Texas 32

Conclusion 35

Signature 36

Certificate of Service 37

LIST OF AUTHORITIES

PAGE

CONSTITUTIONS AND STATUTES

U.S. Constitution
Article II, Section 4 ..... 2, 14, 19, 29

Texas Constitution
Article V, Section 1a 4, 14, 20
Article V, Section 11 ..... 3, 19
Article XV, Section 4 ..... 6, 14, 19
Article XVI, Section 41 ..... 3, 14, 19, 29

42 United States Code, Section 1983 ..... 7, 13, 17

Texas Civil Statutes, Article 309 25

CASE AUTHORITIES

Bradley v. Fisher (1872), 80 U.S.
(13 Wall) 335, 20 L.Ed 646 ..... 15, 16

In Re: O. P. Carrillo, District Judge,
Tex.S.Ct. 1976, 542 SW2d 105 ..... 19, 22

Gregoire v. Biddle (2nd Cir. 1949),
177 F.2d 579 27

Haldane v. Chagnon (9th Cir. 1965),
345 F.2d 601 11

In Re: Laughlin, District Judge,
Tex.S.Ct. 1954, 265 SW2d 805 ..... 20, 33

Parr v. U.S. (5th Cir. 1959), 265 F.2d 894,
Reversed U.S.Sup.Ct. 1960, 363 U.S. 370,
4 L.Ed 2d 1277, 80 S.Ct. 1171 34

PAGE

Pierson v. Ray (1967), 386 U.S. 547, 18 L.Ed 2d 288, 87 S.Ct. 1213 ..... 17, 20

Sidney Sparks and R. L. Lynd, d/b/a Sidney Sparks, Trustee, v. Duval County Ranch Company, Inc., et al (5th Cir. 1979), Panel decision, 588 F.2d 124 ..... 2, 8

En banc decision, 604 SW2d 976 .... 2, 8, 11, 15, 21, 22, 23, 26, 29, 30, 31, 35

Winslow v. Duval County Ranch Company, Inc., Tex.Civ.App. 1975, 519 SW2d 217 9

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REPLY BRIEF OF RESPONDENTS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents, SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE (hereafter SPARKS), reply to the brief of Petitioner, ORVILLE E. DENNIS (hereafter DENNIS) as follows:

OPINIONS BELOW

The District Court's memorandum order is included in the Appendix to the Petition for writ submitted by ORVILLE E. DENNIS in No. 79-1186 at Page A-1. The panel decision of the Court of Appeals is reported in 588 F2d 124, and the en banc decision under review is reported in 604 F2d 976.

JURISDICTION

Jurisdiction under 28 USC, Sec. 1254(1) is not questioned.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article II, Section 4 Removal from office: The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors. (Emphasis added)

Texas Constitution, Article XVI, Section 41, Bribery and acceptance of bribes: Any person who shall, directly or indirectly, offer, give, or promise, any money or thing of value, testimonial, privilege or personal advantage, to any executive or judicial officer or member of the Legislature to influence him in the performance of any of his public or official duties, shall be guilty of bribery, and be punished in such manner as shall be provided by law..... and shall incur the disabilities provided for said offenses, with a forfeiture of the office they may hold, and such other additional punishment as is or shall be provided by law. (Emphasis added)

Texas Constitution, Article V, Section 11, Disqualification of judges; exchange of districts; holding court for other judges: No

judge shall sit in any case wherein he may be interested.....

Texas Constitution, Article V, Section 1a created the Texas Judicial Qualification Commission by amendment adopted November 2, 1965; it was again amended November 3, 1970; and after the Carrillo impeachment, it was again amended on November 8, 1977, adding certain powers to the Supreme Court, including power to bar a removed judge from holding judicial office in the future. Only pertinent provisions of the 1977 amendment follow:

Section 12(2)

> The name of the State Judicial Qualifications Commission is changed to the State Commission on Judicial Conduct.
>
> (6)A. Any Justice or Judge of the Appellate Courts and District and Criminal District Courts may be removed from office for willful or persistent conduct,

which is clearly inconsistent with the proper performance of his said duties or casts public discredit upon the judiciary or administration of justice.

(8) After such investigation as it deems necessary, the Commission may, in its discretion, request the Supreme Court to appoint an active or retired District Judge or Justice of a Court of Civil Appeals, or retired Judge or Justice of the Court of Criminal Appeals or the Supreme Court, as a Master to hear and take evidence in any such matter, and to report thereon to the Commission. The Master shall have all the power of a District Judge in the enforcement of orders pertaining to witnesses, evidence, and procedure. If, after formal hearing, or after considering the record and report of a Master, the Commission finds good cause therefor, it shall issue an order of public censure or it shall recommend to the Supreme Court the removal or retirement, as the case may be, of the person in question holding an office named in Paragraph A of Subsection (6) of this Section and shall thereupon file with the Clerk of the Supreme Court the entire record before the Commission.

(9) The Supreme Court shall review the record of the proceed-

> ings on the law and facts and in its discretion may, for good cause shown, permit the introduction of additional evidence and shall order public censure, retirement or removal, as it finds just and proper, or wholly reject the recommendation. Upon an order for involuntary retirement for disability or an order for removal, the office in question shall become vacant. The Supreme Court, in an order for involuntary retirement for disability or an order for removal, may prohibit such person from holding judicial office in the future. The rights of an incumbent so retired to retirement benefits shall be the same as if his retirement had been voluntary. (All emphasis added)

Texas Constitution, Article 15, Section 4, Impeachment, Judgment; indictment, trial and punishment: Judgment in cases of impeachment shall extend only to removal from office, and disqualification from holding any office of honor, trust or profit under this State. A party convicted on impeachment shall also be subject to indictment, trial

and punishment according to law. (Emphasis added)

42 United States Code, Section 1983:

> "Civil action for deprivation of rights; Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

QUESTION PRESENTED

Does a private citizen, who has bribed a state court judge, and those in conpiracy with him, derive immunity from damages under 42 USC Section 1983 from the judge who is held to be immune under the doctrine of judicial immunity?

STATEMENT OF THE CASE

The material allegations are stated in the panel decision of the Fifth Circuit 588 F2d 124, and in the en banc decision reported in 604 F2d 976. Briefly, the complaint alleges that Clinton Manges (hereafter Manges) sole owner of Duval County Ranch Co., Inc., (hereafter DCRC) in a series of transactions bestowed on Judge O. P. Carrillo (hereafter Carrillo) the then Judge of the 229th District Court of Duval, Starr and Jim Hogg Counties, Texas, numerous gifts and favors (App.8-10) in exchange for the Judge's agreement to rule as Manges desired in matters in which he was interested. (App. 10-11) The judge consummated the conspiracy by issuing the wrongful injunction halting for some thirty-one months Respondent SPARK'S production of petroleum products from three wells

located on an 80 acre tract adjoining DCRC's lands. (App.12-13 and 17) The injunction was ultimately dissolved in Winslow v. Duval County Ranch Co., Inc., Tex.Civ.App. 1975, 519 SW2d 217, wherein the Appellate Court at p. 224, reviewed pertinent facts and cast light on the unlawful nature of the injunction:

> "Thus, under broad conclusory allegations of a very general nature applicable to all defendants alike (when the proof showed a lack of concert of similarity of action), the trial court enjoined all defendants in a common order prohibiting them from the further exercise of their lawful right to produce oil. This was done upon a record which did not support the broad order which was entered; upon a record which contained neither pleading nor proof of the lack of an adequate remedy at law, where there was no allegation of insolvency or proof of inability to respond in damages; done without giving any consideration to the doctrine of clean hands, laches, balancing of equities, or a showing that a less drastic injunctive or-

der (i.e. one forbidding further pollution) was not adequate to protect plaintiff's alleged rights.

From the foregoing resume of the case, it is apparent that we are of the opinion that the trial court abused its discretion in enjoining the defendants from production of oil from the leased premises. The decree of the trial court enjoined the defendants from activities which were lawful and within a proper legal exercise of their rights--the production of oil. In granting the injunction, the trial court abused its discretion and violated the rules set out in Villalobos v. Holguin, supra (208 SW2d at 875), and Scoggins v. Cameron County Water Imp. Dist. No. 25, supra (264 SW2d at 173).

As to SPARKS-LYND, the court added:

"Thus, we hold that 'the issuance of the injunction in this case [against Lynd-Sparks] violates this provisions of the law and regardless of the rights of the parties finally to be adjudicated, we hold that the writ was improvidently issued at the time it was, and under the conditions then existing.'"

The district court and panel held that Judge Carrillo was immune, although the un-

lawful injunction was inducted by bribery. The district court and panel then followed Haldane v. Chagnon, 345 F2d 601 (9th Cir.) and its progeny to hold that the state judge, being immune, the required color of state action was missing, and those private persons who bribed the judge or conspired with those who bribed him, derived immunity from the judge.

The en banc decision rejected the Haldane doctrine of derivative immunity under the facts of this case.

ANSWER TO SUMMARY OF ARGUMENT

Petitioner summarized (paragraphs I to XI, p. 6-11) that the doctrine of immunity shields judges, not only from liability in civil cases, but also from ordinary duties of citizenship such as giving testimony of facts within their knowledge relating to conspira-

cies of private parties. We contend that no public purpose is served by such extension, and that such extension would tend to corrupt the judiciary, not preserve its integrity and independence.

It may well have been said (we think as improvident dicta) that a judge is not liable no matter how corrupt his acts. It is a correct maxim that any rule without exceptions, is a bad rule. To immunize a judge who gave up his independence for a bribe, and then to immunize the person who bribed him, all on a theory that this somehow preserves independence of the judicicial mind, is per se, absurd!

No case by Petitioner in support of derivative immunity has accorded such immunity to a private person involved in conspiracy whereby a judge was bribed, where the

judge had been held disqualified thereby, or where the judge had been removed from office for corruption by impeachment. Consequently, such cases do not apply factually, and are factually irrelevant. Most of such cases could have been decided on a more correct ground that no conspiracy was pled or shown.

To argue that the judge is not a "person", and therefore there was no "state action" as contemplated by 42 USC Sec. 1983, is but to building one fiction upon another fiction to arrive at an unjust result not intended by Congress, and not invited by considerations of public policy. Even if we concede for argument that the judge is not a "person", it does not follow that the wrongful injunction he issued as judge of a state court, which injunction Respondents obeyed to their substantial damage for 31 months, was

not "state action" as contemplated by Section 1983.

ARGUMENT IN REPLY

Argument of Petitioner, and where applicable, the amicus curiae arguments of the States of Florida and Texas will be answered as follows:

I. PUBLIC POLICY SUPPORTS THE EN BANC DECISION.

A. Bribery, the Ultimate Judicial Corruption is Here Involved:

In matters involving bribery of any public official, more especially a judge, the expressions of public policy contained in the U. S. Constitution, Article II, Sec. 4, and Texas Constitution, Article V, Sec. 1a, Article XVI, Sec. 41, and Article XV, Section 4 could hardly be made more clear. Public officials guilty of bribery should be im-

peached, removed from office, and barred from again holding public office.

B. Public Policy Is Designed to Preserve Independence of Honorable Judges; Not to Conceal Corruption in the Judiciary:

Petitioner cites Bradley v. Fisher, 80 U.S. (13 Wall) 335, 20 L.Ed. 646 (1872) wherein a judge, threatened with physical violence, held the party making the threat in contempt, and courageously preserved the integrity and independence of his court. This is the exact opposite of the facts in Sparks, where the judge, under the inducement of a bribe, voluntarily surrendered the independence of his judicial mind, and subordinated his judicial will to the corrupt scheme of the briber.

Respondents do not complain of the application of the doctrine of immunity to aid

of judicial independence, but of the extension of the doctrine to immunize those who have corrupted a judge by bribery, destroyed his independence, and thereby denied Respondents a basic constitutional right to trial of their case before an impartial and independent judge.

That part of Justice Field's opinion in Bradley that most nearly expresses the essence of public policy (U.S. p. 356, L. Ed. p. 652) is:

> "No one would pretend that an attempt to control the deliberation of the Bench, by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice. And an enormity of the sort, practised but on a single judge, would be an offense as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the

consequences to suitors and the public would be the same)."

That a single judge's independence is compromised truly is "an enormity," and it is no less so if independence is given up voluntarily in exchange for a bribe, because, as the court observed, "the consequences as to the suitors and the public would be the same."

C. Pierson v. Ray did not accord immunity to private parties:

Petitioner next cites Pierson v. Ray 386 U.S. 547, 18 L.Ed.2d 288, 87 St. Ct. 1213 (1967) which held that Section 1 of the Civil Rights Act of 1871 (42 USC Sec. 1983) did not abolish the common law doctrine of immunity of judges for acts within their jurisdiction. Pierson did not immunize private individuals who corrupted a judge. This holding by the majority in Pierson drew strong dissent from Justice Douglas, who urged that Congress did

in fact intend to abolish the doctrine of immunity in Section 1983 cases, and that independence and integrity of the judiciary would not be aided by immunity in civil rights cases. (386 U.S. 558 18 L.Ed. 297) While his dissent did not persuade the majority in Pierson, it applies with great force against extension of the doctrine to immunize those private persons who corrupt and destroy the independence of a single judge.

D. Conflict of Circuits on Derivative Immunity:

Respondents concede that the policy behind the doctrine of judicial immunity is to preserve the independence of the judiciary. It is the fact that Respondents were denied the blessings of an independent judiciary that brings them before this court with

this complaint. Respondents concede further that there is a conflict in the rulings of the circuits on the issue of derivative immunity, as alleged in Petitioner's Brief, Paragraphs VIII and IX, p. 21-23. No case cited by Petitioner involved facts where the private party had bribed a judge, thereby involving the judge in a disqualifying and impeachable offense, (U.S. Constitution, Article II, Sec. 4; Texas Constitution, Article V, Sec. 11, Article XV, Sec. 4, and Article XVI, Sec. 41), and the private parties in the serious crime of bribery and conspiracy. The judge here has been disqualified, impeached, removed as judge, and prohibited from again holding judicial office. (In Re: O. P. Carrillo, District Judge, Tex. S.Ct. 1976, 542 SW2d 105)

The ordeal of impeachment brought on an Amendment to the Texas Constitution empowering the Supreme Court, upon removal of a corrupt judge, to bar him from again holding judicial office, (Texas Constitution, Article V, Sec. 1a) thereby plugging the loophole noted in In Re: Laughlin, S.Ct. 1954, 265 SW2d 805.

Respondents contended in 79-1239, as did Justice Douglas' dissent in Pierson, that the judge himself should not be absolutely immune. We lost that issue, but it does not follow that a judge should be permitted to confer immunity on a litigant by accepting a bribe from him! To allow such would be a mockery of the doctrine's rationale to promote judicial independence.

E. Public Policy and Logic Support the En Banc Decision:

It is not exactly correct to refer to the en banc decision of the court below as "The Minority Rule in the Circuit Courts," as Petitioner does in Paragraph XI. No circuit had been faced, prior to Sparks, with a case involving the ultimate judicial corruption of bribery whereby a judge voluntarily surrendered his independence, thereby destroying the very independence immunity was intended to preserve. While not raising questions as to the correctness of the results of the many cases cited in Petitioner's Paragraph VIII, p. 21-22, Sparks did demonstrate the flaw in reasoning if the idea of derivative immunity were carried to its absurd conclusion of conferring immunity on a private person who bribes a judge, and those who conspire with him.

Certainly, in no case cited by Petitioner in Paragraph VIII, did the private defendants excused perform any act or acts which would have destroyed the independence of the judge. Nor did the judge in any case so cited voluntarily give up his independence and subordinate his will to that of corrupt litigants before him. Nor was the fact of judicial misconduct proved in a disqualification proceeding, as in Sparks, and the judge impeached and removed for a series of corrupt acts. (In Re: Carrillo District Judge, Tex. S.Ct. 1976, 542 SW2d 105) Consequently, the cases relied upon by Petitioner do not apply factually.

The doctrine of judicial immunity is for the benefit of the public through improvement of the administration of justice. No one can appreciate the importance of an independent

judiciary more than a member of the public who has tried his case before a judge who has accepted a bribe from the opposing litigant, as in Sparks. Sparks is here because a private citizen succeeeded by unlawful means in inducing a judge to abandon his independence and abuse his office. It is a paradox that the private individual here claims immunity because he succeeded in inducing a judge to participate in his unlawful scheme. To permit the private persons who conspire to and to corrupt a judge to derive immunity from the judge would constitute an open invitation to criminal and corrupt elements of society to interest themselves in the elective and appointive processes by which judges attain their offices. As the majority observed in Sparks:

> "Sound policy suggests that attempts by such persons to subvert the judiciary should be penalized in every just way, civil as well as criminal. It suggests that the fullest redress that the judicial system can accommodate while functioning effectively should be granted for such odious wrongs. And it suggests that the actual incentive to corruption held out by the present doctrine, with its promise of civil immunity to those who succeed in involving a judge's powers in their nefarious schemes, should be removed."

II. BALANCING OF EVILS FAVORS EN BANC RULING: In answer to Petitioner's Brief, Paragraphs X, and XI, p. 24-32, and Amicus Curiae States of Florida and Texas, Respondents contend:

A. Inconvenience to Judges does not exceed basic requirements of citizenship:

If we are to have and preserve a government of laws, then any erosion of the means of enforcing such laws, or any doctrine that excuses public officials charged with en-

forcing the law and maintaining the integrity of our system or laws is per se suspect. The duty of those with knowledge of facts to give testimony is so basic to our institutions that it can be compelled, not only by the sovereign, but by civil litigants, and even by persons charged with crimes.

The oath of allegiance of the citizen includes the ideal of "liberty and justice for all." Texas lawyers (as is true in all states) are bound by oath to uphold and defend the Constitution and laws of Texas and the United States, to which is added that he will "discharge his duty to his client to the best of his ability." (Art. 309, Tex.Civ. Stats.) The oath of United States Justices and Judges binds them to "administer justice without respect to persons." Surely public policy expressed in so basic provisions as

oaths required of all from private citizens to Justices of the Supreme Court and President, cannot be so tortured as to excuse those charged with its administration from its most basic duty of giving testimony; nor is it tolerable to allow private persons who succeed in involving a judge in bribery to go free of civil liability along with the judge under the doctrine of immunity.

As observed in Sparks (604 F2d 976, at p. 980) the inconvenience to the judge is "comparatively insignificant" considered in connection with the harm which would flow from allowing derivative immunity. The en banc decision does not impose on a judge any inconvenience, but only requires of him his plain duty as a citizen.

B. Public Policy Supporting Immunity for Judges does not apply to Private Parties:

Petitioner quotes from Gregoire v. Biddle, 177 F2d 579 at p. 581 in support of his argument that "balancing the relative harms" supports derivative immunity for petitioner. The trouble here is that in Gregoire the parties acquired immunity by virtue of the public office each held, and no defendant derived immunity from an immune official. So, the case does not support the argument.

1. Petitioners' (and Amicus') Argument is based on two false presumptions: Petitioner would have the court believe that if Respondents prevail, (i) every unsuccessful litigant in a state court case will seek to relitigate his case in federal court under Section 1983; and (ii) that judges would be so harassed and intimidated by discovery procedures and subpoenaed testimony that they

cannot maintain their integrity or independence. Both presumptions are patently false, and totally against all human experience and judicial history. What lawyer, after having tried his client's case on the merits in state court and lost, would feel he could better himself or his client by filing a frivolous complaint in federal court falsely alleging a nonexistent conspiracy between the state judge and the opposing litigant? To ask the question is to answer it. Judicial history is to the contrary. Very few cases are appealed beyond the trial court level. There yet exists a Code of Ethics and Rules of Procedures which would not be ignored with impunity, as Petitioner and Amicus Curiae suggest. There exists also a Code of Judicial Conduct approved by the American Bar Association which counsels judges against

being swayed by partisan demands, public clamor, etc. and especially against ex parte communications. Bribery is a felony in Texas and most states, and is an impeachable offense under the U. S. and Texas Constitutions. Certainly with these restraints it is not realistic to presume that violations would be so pervasive among judges that judges generally would be intimidated by a possibility of being required to tell the truth about their conduct in any case over which they presided.

The fallacy of these presumptions is possibly best illustrated by the quotation from the minority in Sparks, appearing on page 8-10 of the Florida Amicus brief, in reference to the "chilling effect of submission to discovery and the appearance as a witness." We submit that no honorable judge,

who has conducted himself according to the Code of Judicial Conduct, even though he may have made an erroneous ruling, would feel a "chilling effect" from answering honestly any questions propounded to him. However, if he had accepted bribes from a litigant, or had held secret ex parte communications and reached unlawful accords with a litigant, then his dilemma of whether to (1) take the fifth; (2) tell the truth and expose himself; or (3) to add perjury to his offense and hope not to be caught, would indeed be chilling. It should be!

The final sentence of the quotation from the minority in Sparks, (Florida brief, p. 10) is no less revealing:

> "Finally, if a judge condones a particular course of conduct, it seems manifestly unfair that the judicial expert should be immunized from attack but that the untutored lay person should be vulnerable to

> costly attack for participating in the same activity as the judge."

Just what is the contention here? Are they saying that if a judge will accept a bribe, the layman should be free to give it, and both should be immune? Of all the horrors speculated about by Petitioner, Amicus and the minority in Sparks, none could be more devastating to the independence of the judiciary than this.

2. Answer to Florida's Contention re: Guardians ad litem, etc.: Respondent's position is that denial of derivative immunity for private persons who bribed a judge, and those who conspired with such private persons, will not result in denial of immunity to such parties as guardians ad litem. Such persons are accorded absolute or limited immunity because they are officers of the court. A private litigant does not have

legal status as an officer of the court or as a public official. We contend that officers of the court and other public officials are not affected by the en banc decision denying immunity to private parties.

III. REMEDIES AVAILABLE IN TEXAS.

The invitation, contained in Petitioner's brief p. 28, that we pursue remedies against petitioner in state courts has the ring of Brer Rabbit's preference for the briar patch. Carrillo was sitting as judge of the state court when this suit was filed. After Carrillo's removal, the new elected judge declines to try cases involving Manges, for obvious reasons. The difficulties and uncertainties of securing visiting judges under existing procedures are sufficient obstacle alone to make a federal forum preferable. A case involving denials of consti-

tutional rights belongs in federal court. Respondents, who as plaintiffs below, have the option to select the forum, have selected a federal forum for valid reasons, which are discussed in "REPLY OF RESPONDENTS TO PETITION OF ORVILLE E. DENNIS FOR WRIT OF CERTIORARI", page 16-27, which arguments are here adopted.

Some observations concerning obstacles faced by Respondents in pursuing the state court option may be helpful. The loophole displayed in Laughlin in 1954, which allowed a state judge, removed by the Supreme Court for corruption, to run for and again hold judicial office, was not closed until the Constitutional Amendment passed in November 1977 in response to the Carrillo impeachment. Although thefts from political subdivisions were clearly established in Parr v. U.S., 5th

Cir. 1959, 265 F.2d 894, and S.Ct. 1960, 363 U.S. 370, 4 L.Ed.2d 1277, 80 S.Ct. 1171, the State of Texas made no effort through the local District Attorney or Attorney General to recover the stolen funds from the defendants, one of whom was, incidentally, O. P. Carrillo. Although it was proved in disqualification proceedings in a civil case that Manges had given and Carillo had accepted bribes, and bribery is a felony under Article 36.02 of the Texas Penal Code, neither the District Attorney nor the Attorney General have caused prosectuion to be brought against Manges.

Respondents have no apology for declining Petitioners' invitation to fight it out in the Duval County briar patch.

IV. CONCLUSION

The en banc decision of the Fifth Circuit majority denying derivative immunity to petitioner is supported by sound considerations of public policy, and should be affirmed. The public policy considerations of supporting independence of the judiciary are not served by extending immunity to private persons who bribed a state judge or conspired with one who did. Any inconvenience suffered by judges who might be called as witnesses is outweighed by the public policy undergirding this nation's ideals of a government of laws with equal justice to all. As observed by the majority in Sparks, "that the actual incentive to corruption" held out by the present doctrine (of derivative immunity) with its promise of civil immunity to those who succeed in involving a judge's powers in

their nefarious schemes, should be removed.

(Emphasis added)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Reply Brief of Respondents have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to counsel of record for Petitioner, Mr. Finley L. Edmonds, P. O. Box 2624, 1515 Bank & Trust Tower, Corpus Christi, Texas 78403; to attorneys for Amicus Curiae, Hon. Mark White, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, and Hon. Jim Smith, Attorney General of Florida, The Capitol, Tallahassee, Florida, 32301, on this 21st day of May, 1980.

Garland F. Smith

GARLAND F. SMITH

MOTION FILED
JUN 10 1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1186

ORVILLE E. DENNIS,

Petitioner,

—v.—

SIDNEY SPARKS and R.L. LYND
d/b/a SIDNEY SPARKS, TRUSTEE,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE, AND BRIEF *AMICI CURIAE*

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TABLE OF CONTENTS

Page:

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE. i

TABLE OF AUTHORITIES. iv

INTEREST OF AMICI 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT. 7

I. A PRIVATE PERSON WHO CONSPIRES WITH A JUDGE TO DEPRIVE ANOTHER PERSON OF HIS CIVIL RIGHTS IS AMENABLE TO SUIT UNDER 42 U.S.C. § 1983 NOTWITHSTANDING THE JUDGE'S ABSOLUTE IMMUNITY 7

A. Suits Alleging Conspiracies Between Absolutely Immune State Judges and Private Persons State § 1983 Claims For Which Relief May Be Granted 9

B. Defendant Has No Standing to Assert, and This Court Should Not in This Case Consider, the Interests of Immune Judges 13

II. THERE ARE NO POLICIES IN FAVOR OF GRANTING DERIVATIVE IMMUNITY TO PRIVATE PERSONS WHICH OVERRIDE THE CONGRESSIONAL POLICY OF PROVIDING REMEDIES FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS . . .17

CONCLUSION. 29

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 79-1186

Orville E. Dennis,

Petitioner,

-v-

Sidney Sparks and R.L. Lynd
d/b/a Sidney Sparks, Trustee,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The American Civil Liberties Union respectfully moves, pursuant to Rule 42 of this Court's rules, for leave to file the within brief amici curiae. Counsel for the Respondents have consented to the filing of this brief.*/ Counsel for the Petitioner have refused consent.

The American Civil Liberties Union is a nationwide, non-partisan organization of two hundred thousand members, dedicated to defending the principles embodied in the

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*/ A copy of that letter is being filed with the Clerk.

Bill of Rights to the Constitution. The ACLU and its affiliates have a deep interest in preserving the vital role of 42 U.S.C. §1983 as a deterrent to officially sanctioned private lawlessness, and as a means of redress for constitutional wrongs. Accordingly, the ACLU has sought to maintain effective remedies for deprivations of civil rights under color of law.

ACLU attorneys represented petitioners in Pierson v. Ray, 386 U.S. 547 (1967), and Scheuer v. Rhodes, 416 U.S. 232 (1974). The ACLU also participated as amici in Stump v. Sparkman, 435 U.S. 349 (1978), and in other cases to support remedies for civil rights violations. The ACLU believes that all private persons who conspire with public officials should be held accountable to those whose civil rights they violate, and that the possibility of liability can ensure greater fidelity to constitutional guarantees.

Amici thus have a strong interest in the issues presented by this case, and more importantly, extensive experience with those issues. With the benefit of this experience, Amici will make arguments which will not, to our knowledge, be made by the parties. The brief submitted with this motion will argue

that this case presents only the threshhold issue of whether a claim under §1983 has been stated when a private person is alleged to have conspired with an absolutely immune state judge. Amici will suggest that a broader ruling concerning the extent to which state judges can be compelled to participate in §1983 litigation is not necessary in this case, and should await a more suitable occasion for consideration.

The brief also provides the Court with the legislative history of the Civil Rights Act of 1871, crucial for understanding the expectations the 42nd Congress had for what is now 42 U.S.C. §1983. Finally, Amici examine the various policies in favor of and against the extension of judicial immunity to private persons.

In order to present this analysis, Amici respectfully move for leave to file the within brief.

Respectfully submitted,

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398 U.S. 144 (1970). 4,9,10

Barrows v. Jackson,
346 U.S. 249 (1953). 4,13

Bivens v. Six Unknown Narcotics Agents,
403 U.S. 388 (1971). 18

Bradley v. Fisher,
80 U.S. 335 (1872) 23

Butz v. Economou,
438 U.S. 478 (1978) 5,6,7,18,19,20,24,28

Davis v. Passman,
442 U.S. 228 (1979). 18

Downs v. Sawtelle,
574 F.2d 1 (1st Cir. 1978). . . . 11,27

Gravel v. United States,
408 U.S. 606 (1972). 24

Imbler v. Pachtman,
424 U.S. 409 (1976). 5,19

In Re Attorney General of the United
States, 596 F.2d 58 (2nd Cir. 1979),
cert. denied, ___ U.S. ___, 100 S. Ct.
217 (1979) 16

Landmark Communications, Inc. v.
Commonwealth of Virginia,
435 U.S. 829 (1978). 24

Marbury v. Madison,
1 Cranch 137 (1803). 17,24

Cases: Page:

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365 U.S. 167 (1961). 19,22,27

O'Shea v. Littleton,
414 U.S. 488 (1974). 6,24

Pierson v. Ray,
386 U.S. 547 (1967). 13,20,21

Robinson v. Bergstrom,
579 F.2d 401 (7th Cir. 1978) 11

Roviaro v. United States,
353 U.S. 53 (1957) 17

Singleton v. Wulff,
428 U.S. 106 (1976). 14

Slotnick v. Staviskey,
560 F.2d 31 (1st Cir. 1977). 24

Snepp v. United States,
62 L. Ed.2d 704 (1980) 18

Sparkman v. McFarlin,
601 F.2d 261 (7th Cir. 1979) 27

Sparks v. Duval County Ranch Co.,
604 F.2d 976 (5th Cir. 1979) 2,12

Stump v. Sparkman,
435 U.S. 349 (1978). 13

Sullivan v. Little Hunting Park,
396 U.S. 229 (1969). 26

Supreme Court of Virginia v. Consumers
Union of the United States,
___ U.S. ___ (48 U.S.L.W. 4620,
June 3, 1980). 15

Cases: Page:

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341 U.S. 367 (1951). 19

United States v. Fromme,
405 F. Supp. 578 (E.D. Cal. 1975). . .25

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418 U.S. 683 (1976). 16,25

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383 U.S. 787 (1966). 2,10,22

United States v. Raines,
362 U.S. 17 (1960) 14

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18 U.S.C. § 242. 10,24

42 U.S.C. § 1983 . . . . . .passim

42 U.S.C. § 1988 26

Civil Rights Act of 1871 20

Revised Statutes of the United
States, 1878 20

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In The

SUPREME COURT OF THE UNITED STATES

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Orville E. Dennis,

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-v-

Sidney Sparks and R. L. Lynd

d/b/a/ Sidney Sparks, Trustee,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION Amici Curiae

Interest of Amici Curiae

The interest of Amici Curiae appears in the foregoing motion.

STATEMENT OF THE CASE

Amici adopt and rely on the facts as stated in the Fifth Circuit's opinions below. Sparks v. Duval County Ranch Co., Inc., 588 F.2d 124, rehearing en banc 604 F.2d 976 (5th Cir. 1979). Briefly stated the facts are as follows.

Respondents, owners of oil and gas wells, brought an action under 42 U.S.C. §1983 against certain private individuals, petitioner among them, alleging that they conspired with state judge Carrillo to deprive them of their property rights. It was alleged that Manges, one of the defendants, had given Carrillo several gifts and favors in exchange for the judge's agreement to rule in his favor in all cases in which Manges was interested.[1/] The conspiracy culminated in the judge's issuance of an injunction

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1/ In fact, Carrillo was subsequently removed from office by the Texas Supreme Court and is presently incarcerated in a federal penitentiary on income tax charges.

prohibiting the respondents from producing oil. Petitioner Dennis was alleged to have acted as surety on the injunction bond, in knowing furtherance of the conspiracy. The injunction, which lasted thirty-one months, was ultimately dissolved by the Texas Court of Civil Appeals.

The district court dismissed the complaint on the ground that judicial immunity barred suit against Carrillo and that therefore there were no claims under color of law alleged against the remaining private defendants.

SUMMARY OF ARGUMENT

An allegation of conspiracy between an absolutely immune state judge and private persons states a claim under §1983. The judge's immunity from liability has no bearing on whether there has been a deprivation of right under "color of law." A private person who has participated jointly with a judge in a conspiracy to deprive another of his legal rights, has acted "under color of law" for purposes

of §1983 subject matter jurisdiction. Adickes v. Kress & Co., 398 U.S. 144, 152 (1970). In fact, a §1983 suit against private defendants need not even join the state actor as a party.

Petitioner has no standing to assert the interests of immune judges. Yet all of the policy considerations that he raises to support his claim for derivative immunity concern the judiciary's interest in avoiding involvement in §1983 litigation. This Court should apply its general rule that a party may not claim standing to vindicate the rights of third parties. Barrows v. Jackson, 346 U.S. 249 (1953).

Even if it is assumed that petitioner has such standing, this case does not require a broad ruling on the extent to which judges can be compelled to participate in §1983 litigation. The only question presented here is whether a §1983 claim alleging a conspiracy with an absolutely immune state actor states a claim for which relief may be granted. Determination of appropriate judicial involve-

ment in §1983 litigation should await future fact situations that spell out more clearly the competing interests involved.

There are no policy considerations that override the Congressional purpose behind §1983 of providing redress for deprivation of constitutional rights. The 42nd Congress enacted §1983 during Reconstruction, a period when state court systems were unwilling to provide effective redress for violation of federal rights, and often cooperated with private individuals in perpetuating those wrongs. Under the circumstances, petitioner must bear the burden of showing that public policy requires immunity. Butz v. Economou, 438 U.S. 478 (1978). Clear legislative intent and the absence of such immunity at common law compel the conclusion that §1983 cannot accommodate derivative immunity for private persons. Imbler v. Pachtman, 424 U.S. 409, 421 (1976).

Current policy considerations in favor of such immunity are no more persuasive. The claim that the judiciary will be overwhelmed with §1983 litigation assumes that the courts possess no power to weed out those claims that are patently frivolous before ever reaching the discovery or trial stage. Butz v. Economou, supra, at 507. Furthermore, the arguments ignore the fact that judges have always been amenable to process in a variety of other contexts. O'Shea v. Littleton, 414 U.S. 488 (1974). Indeed, there are several remedies available to respondent under Texas law which might well require Judge Carrillo's participation in discovery and trial.

It would be unfair to free private persons from liability under §1983 solely because they may have succeeded in conspiring with an absolutely immune state official. The policies in favor of judicial immunity do not apply to them; they are not subject to the same pressures of office; and they are not answerable to higher courts. Butz

v. Economou, supra, at 512. There is simply no valid societal interest in granting private persons derivative judicial immunity.

ARGUMENT

I. A PRIVATE PERSON WHO CONSPIRES WITH A JUDGE TO DEPRIVE ANOTHER PERSON OF HIS CIVIL RIGHTS IS AMENABLE TO SUIT UNDER 42 U.S.C. §1983 NOTWITHSTANDING THE JUDGE'S ABSOLUTE IMMUNITY.

The question presented in this case is whether a private person, alleged to have conspired with a judge to deprive another person of his constitutional rights, is amenable to an action for damages under 42 U.S.C. §1983, or whether he derivatively enjoys the judge's absolute immunity from such suit. Where, as here, the judge is the only state agent alleged to have participated in the conspiracy, clothing the private person with absolute judicial immunity would require dismissal of the claim at the outset. Denying the private person immunity would allow a §1983 claim to survive a dis-

missal motion, but would not dispose of the question of the extent and nature of the judge's participation in the suit. Because petitioner, as a private person, has no standing to and cannot adequately represent the interests of the judiciary in avoiding such involvement in §1983 suits, Amici respectfully submit that the Court should hold in this case only that non-immune conspirators are presumptively subject to §1983 liability, leaving for another day questions regarding the circumstances, if any, under which immune persons can be required to participate in discovery or trial.

Two reasons are advanced to support dismissal of this case against the petitioner who, on the current record, must be presumed to have deprived respondents of their civil rights. First, asserting lack of subject-matter jurisdiction, petitioner points out that, as a private party, he is subject to suit under §1983 only where he has acted "under color" of law, and he claims that requirement cannot

be met where the state actor is immune. Second, assuming arguendo that all the jurisdictional requirements of §1983 are met, he claims that the policy arguments in favor of judicial immunity require a per se rule derivatively extending that immunity to private defendants only by virtue of their participation with the immune judge. We deal with each of these arguments in turn.

A. Suits Alleging Conspiracies Between Absolutely Immune State Judges and Private Persons State §1983 Claims For Which Relief May Be Granted.

Private persons acting in concert with state actors are ordinarily subject to suit under 42 U.S.C. §1983. To act "under color" of law requires only that the defendant be "a willful participant in joint activity with the state or its agents...." Adickes v. Kress & Co., 398 U.S. 144, 152 (1970), quoting United States v. Price, 383 U.S. 787, 794 (1966). The "under color of law" requirement is satisfied in such cases by participation of the

state actor in the events leading to the lawsuit, and does not require his presence in the lawsuit. Whether the state actor is actually named as a defendant is immaterial; the state actor's joint participation with the private defendants transforms the actions of all participants in the challenged activity into actions taken "under color of law," even though the state actor is not even named as a §1983 defendant. E.g., Adickes v. Kress, supra. 2/

Because the state actor's participation only in the challenged activity, not in the lawsuit, is sufficient for §1983 subject matter jurisdiction, the Court has held that§1983 creates a cause of action against private persons acting jointly with state actors even where the state actors may have a qualified immunity from §1983 liability. Adickes v. Kress, supra. Thus, it is settled that

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2/ The rule is the same under 18 U.S.C. §242, the criminal analogue to §1983, United States v. Price, supra.

a private person can be sued under §1983 even if the state actor is not named as a defendant, and even if, though named, the state actor would enjoy qualified immunity.

In the fact of this undisputed body of law, petitioner's argument that subject matter jurisdiction is lacking because the only state actor is absolutely immune is not persuasive. Whatever the policy arguments in favor of absolute immunity (we address those infra), they are irrelevant to the question of whether there has been a deprivation of rights "under color of law." 3/ As the Fifth Circuit noted

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3/ The intermixing of policy arguments and jurisdictional arguments for absolving private persons from §1983 liability was noted by the Seventh Circuit in Robinson v. Bergstrom, 579 F.2d 401, 414 (7th Cir. 1978):

> ...the requirement of "state action" in a section 1983 claim is an essential jurisdictional predicate. Accordingly, where state action is found lacking, the section 1983 complaint is properly dismissed for lack of subject matmatter jurisdiction. Alternatively a question of whether a defendant is immune...is not a jurisdictional issue. Rather, [it] is an affirmative defense....

See also Downs v. Sawtelle, 574 F.2d 1, (1st Cir. 1978).

below:

> the question is not at all whether the agent of the state who acts is subject to any particular sanction. Rather, it is whether he has exercised the power of the state in the premises.

Sparks v. Duval County Ranch Co., 604 F.2d 976, 982 (5th Cir. 1979).

If he has, whether or not he is sued, and whether or not policy arguments immunize him from liability, a §1983 action lies against individuals who have jointly acted with him in deprivation of other persons' civil rights - unless the policy arguments supporting judicial immunity extend to support a broader immunity for private co-conspirators.

B. Defendant Has No Standing To Assert, and This Court Should Not In This Case Consider, The Interests of Immune Judges.

Apart from the technical argument based on lack of subject matter jurisdiction, the defendant relies chiefly upon the policy arguments for judicial immunity examined by this Court in Pierson v. Ray, 386 U.S. 547 (1967) and Stump v. Sparkman, 435 U.S. 349 (1978) to absolve him from §1983 liability. He hardly disputes the facts pleaded in the complaint, and all of the arguments he advances concern the judiciary's asserted interest in avoiding not only liability but also any degree of involvement in §1983 litigation.

In these circumstances, the Court should apply its general rule that "[o]rdinarily, one may not claim standing in this court to vindicate" the rights of third parties. Barrows v. Jackson, 346 U.S. 249, 255 (1953). This rule is a sound prudential limitation, relieving the Court of unnecessary adjudication, and assuring that the third

parties themselves - usually the best proponents of their own rights - will be able to decide if and when those rights are to be vindicated. Singleton v. Wulff, 428 U.S. 106, 113 (1976). In Singleton, this Court enunciated two situations which might justify exceptions to the general rule: First, the relationship of the litigant and the third party must be so close that the rights of the two are inextricably bound up with each other; and second, there must be some obstacle to assertion of the right by the third party.4/

4/ Both were found present in Singleton, where physicians were allowed to assert their patients' constitutional rights to abortion, because of the unique and close nature of the physician-patient relationship in making the medical decision to abort, and the obstacles - including invasions of privacy and imminent mootness - to a woman bringing such a suit on her own.

Although only four Justices joined that part of Justice Blackmun's decision dealing with third party standing, the remaining Justices urged an even more restrictive view. See also United States v. Raines, 362 U.S. 17 (1960)(declining to permit Board of Registrars to assert rights of private parties).

Neither justification applies in this case. Petitioner has no special relationship to the judge whose "immunity" he wishes to assert (other than as a potential co-conspirator, which he denies) or to the judiciary as a whole. And judges are capable of protecting their own rights, if and when those rights are threatened, and if and when they choose to do so. See Supreme Court of Virginia v. Consumers Union of the United States, ___U.S.___, 48 U.S.L.W. 4620 (June 3, 1980). The "general rule" must be applied: petitioners should be limited to asserting their own rights, not those of the judiciary.

But even if the Court finds that defendant can assert the interests of immune judges, the long standing rule that the Court will not formulate a rule of law broader than necessary to decide a particular case should lead it to decline to consider the defendant's third-party arguments. Whatever arguments there may be against involving a judge

in ongoing §1983 litigation to which he is not a party plainly depend on the particular facts of each case and the particular participation at issue.

In many cases, such as this, it may be possible to prove the facts without any participation by the unnamed judge. In others, although some evidentiary participation may at first sight be indicated, it may be possible to devise procedures to satisfy both the interest of plaintiff in pursuing a civil case and the judicial interest, if there is one, in not being called to participate in any manner. Cf. In Re Attorney General of the United States, 596 F.2d 58 (2d Cir. 1979), cert. denied, ___U.S.___, 100 S. Ct. 217 (1979). It may be necessary to insist on heightened standards of necessity prior to requesting evidence from a judge in cases where such evidence is appropriate. Cf. United States v. Nixon, 418 U.S. 683 (1976). There may even be cases where, under standards to be developed, courts will

properly hold that necessary evidence cannot be secured consistent with the public interest, resulting in dismissal of those cases in the interest of justice. Cf. Roviaro v. United States, 353 U.S. 53 (1957). Each of those possibilities is, for now, abstract and hypothetical. Accordingly, we urge the Court simply to hold that defendant is not entitled to clothe himself with the non-party judge's immunity, and to remand this case for further proceedings.

II. THERE ARE NO POLICIES IN FAVOR OF GRANTING DERIVATIVE IMMUNITY TO PRIVATE PERSONS WHICH OVERRIDE THE CONGRESSIONAL POLICY OF PROVIDING REMEDIES FOR DEPRIVATION OF CONSTITUTIONAL RIGHTS.

Perhaps there is no principle more basic to our system of justice than that "...where there is a legal right, there is also a legal remedy by suit, or action of law, whenever that right is invaded." Marbury v. Madison, 1 Cranch 137,

163 (1803). This Court has repeatedly affirmed Marbury's declaration that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Davis v. Passman, 442 U.S. 228, 60 L.Ed. 2d 846, 861 (1979)(emphasis added). See also Butz v. Economou, 438 U.S. 478, 485 (1978); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971). The Court only recently pointed out the anomaly and difficulty under our jurisprudence, of leaving an injured litigant with "no remedy at all." Snepp v. United States, 62 L.Ed. 2d 704, 711(1980).

In light of these principles, the Court has required those who wish to invoke the doctrine of official immunity from liability for unconstitutional conduct to "bear the burden of showing that public policy requires an exemption." Butz v. Economou, supra, at 506. The defendant here must overcome two particularly strong policy arguments against extension of immunity.

Extension of the doctrine of official immunity to private persons would further weaken our commitment to a jurisprudence where legal wrongs are redressed by legal remedies. Moreover, private persons would not be deterred from joining with state actors to commit constitutional wrongs, another critical goal of §1983.

This Court has held that §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 172 (1961). A parallel concern has been that §1983 be read "in harmony with general principles of tort immunities and defenses rather than in derogation of them." Imbler v. Pachtman, 424 U.S. 409, 418 (1976), citing Tenney v. Brandhove, 341 U.S. 367 (1951). In determining whether immunity should be granted, a two-step analysis has been used: inquiry into the immunity accorded at common law followed by an examination of the relevant policy considerations. Imbler v. Pachtman,

supra, at 421. See also Butz v. Economou, supra; Pierson v. Ray, supra.

There is no history of common law immunity for private persons who conspire with judges to deprive citizens of legal rights. The language of the predecessor statute for §1983, Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, is clear and uncompromising. It applied to "any" person who under color of state law deprived "any" person of his federal constitutional or statutory rights. 5/

As commentators have noted, 6/ given the Reconstruction setting in which §1983 was

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5/ As altered by the reviser who prepared the Revised Statutes of 1878 and as printed in 42 U.S.C., the statute refers to "every" person who deprives "any" person of his rights. "Every" is just as conclusive as "any," and of course the reviser lacked authority to amend the law substantively. See Revised Statutes of the United States, 1878, Preface, p.4, Appendix, pp. 1092-93 Stat. 268, ch. 82, §4, as amended by 20 Stat. 27, ch. 26.

6/ See Note, Liability of Judicial Officers Under 42 U.S.C. §1983, 79 Yale L.J. 322, 325-28 (1969). See also Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1154-56 (1977).

enacted, it is highly unlikely that the 42nd Congress meant to broaden the scope of any of the official immunities then existing. As Justice Douglas noted in his dissent in Pierson v. Ray, supra, at 559: "A condition of lawlessness existed in certain of the States under which people were being denied their civil rights." Congress was concerned that "immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." 7/ The very situation presented here - the perversion of local systems of justice by private citizens acting in concert with judges - was repeatedly invoked by congressional proponents of the statute.8/

7/Cong. Globe, 42nd Cong., 1st Sess. (Congressman Lowe of Kansas, March 31, 1871, p. 374, col.3).

8/ See for example: Senator Sherman of Ohio (summing up conference report): "Spreading terror and violence...now exist unchecked by punishment, independent of law, uncontrolled by magistrates." (footnote cont'd next page)

It was, indeed, the breakdown of justice that gave rise to the need for legislation. See generally, Monroe v. Pape, supra, at 174-83, 235-36.[9/]

(footnote cont'd from previous page) Cong. Globe, 42nd Cong., 1st Sess., Apr. 19, 1871, p.820, col. 2.

Congressman Rainey of South Carolina: "The courts are in many instances under the control of those who are wholly inimical to the impartial administration of law and equity." Id., Apr. 1, 1871, p. 394, col. 3.

Congressman Beatty of Ohio: "The remedy is needed because of 'prejudiced juries and bribed judges.'" Id., Apr. 3, 1871, p. 429, col. 2.

See also: Congressman Garfield of Ohio, Id., April 4, 1871 App. p. 153, col. 3; Senator Osborn of Florida, Id., April 13, 1871, p. 654, col. 2; Congressman Portor of Virginia, Id., April 4, 1871, App. p. 277.

See also the complaint of a Louisiana loyalist to Carl Schurz that "men who held commissions in the rebel army, who signed the ordinance of secession,...who took a leading part in the rebel movement" were acting as judges in the southern states. Quoted in Stampp, The Era of Reconstruction, 1865-1877 (Knopt 1965) at p. 76.

9/ "The purpose and scope of the [statute] must be viewed against the events and passions of the time." U.S. v. Price, supra, at 803.

The historical record could not be clearer. The obvious concerns behind Congress's enactment of what is now §1983 would be severely undermined by the granting of any new immunities or by broadening the scope of existing immunities.

Certainly policy considerations of fairness support retaining a §1983 remedy for all litigants whose civil rights have been abridged under color of law. The petitioner here, at least, does not and could not argue that his liability for his wrongs is unfair.

The burden of his argument, therefore, is that a rejection of derivative immunity would erode the foundations of judicial immunity. If a judge is made even indirectly answerable for his conduct, he will not be "free to act upon his own convictions without apprehension of personal consequence to himself." Bradley v. Fisher, 80 U.S. 335, 347 (1872). The prospect is raised of a judiciary overwhelmed by a flood tide of §1983 litigation. In such circumstances of embarassment and inconvenience, it is contended, fearless and independent decision mak-

ing will be impossible.

This argument is sheer speculation. There is no reason to suppose that frivolous §1983 claims cannot be disposed of at the pleading stage or on summary judgment. Butz v. Economou, supra, at 507; Slotnick v. Staviskey, 560 F.2d 31,33(1st Cir. 1977). The embarrassment that the pendency of §1983 proceedings might cause is no greater than the embarrassment that arises in any event from disclosure of the operative facts in the press, disclosure that is constitutionally protected, e.g., Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829 (1978). As for inconvenience, judges have always been amenable to process in a variety of other contexts. They can be punished criminally for willful deprivations of constitutional rights under 18 U.S.C. §242, O'Shea v. Littleton, 414 U.S. 488, 503 (1974); Cf. Gravel v. United States, 408 U.S. 606, 627 (1972), and they are amenable to suits seeking declaratory or injunctive relief. Cf. Marbury v. Madison, 1 Cranch 137 (1803).

Other high government officials are also required, under certain circumstances, to give evidence in criminal trials. United States v. Nixon, supra. In United States v. Fromme, 405 F. Supp. 578 (E.D. Cal. 1975), it was held that even a sitting President of the United States could be subpoenaed to testify in a criminal trial, but that in lieu of appearing in court, he would be allowed to give a deposition on video tape. The point is that in each case the court must balance the interests of the official in avoiding the burden of involvement in litigation with the interests in affording litigants fair trials.

The argument that embarrassment and inconvenience necessitate a broad, per se derivative immunity rings particularly hollow in this case, where the defendant has conceded that he is subject to civil suit for the same relief in state court. See Petitioner's Brief, p. 28. Proof of the elements of the state claim would require substantially the same evidence as would be necessary in the federal §1983 action, and would cause no less potential

inconvenience or embarrassment to Judge Carillo. Weighing the rights of litigants, and the interests of its judiciary, Texas has decided to permit suits for relief against individuals alleged to have bribed state judges, and not to immunize those individuals in the interests of "protecting" its judiciary. See Petitioners Brief, p. 28. There is no reason why federal law should restrike the balance that Texas believes best accommodates its interests. See 42 U.S.C. §1988; Sullivan v. Little Hunting Park, 396 U.S. 229, 240 (1969).

Two other arguments can be disposed of briefly. First, the contention that derivative immunity is necessary to prevent federal courts from acting as monitors of state court litigation is baseless. The immunity question only arises in damage suits, where "monitoring" is impossible. To the extent that petitioner complains of a federal action for deprivation of rights by state officials, and those acting in concert with them, his quarrel

is with the 42nd Congress. See Monroe v. Pape, supra, at 183.

Nor is it likely that private persons will be discouraged from going to state court without assurance of derivative immunity. They may be less likely to bribe state court judges - a happy result - but only an assumption that the requisite standards for §1983 liability will suddenly be loosened beyond all reason could be expected to deter individuals from seeking judicial relief. Even if accepted, that argument would tend to support only a qualified good-faith defense for private parties. But as the First Circuit has noted:

> private parties simply are not confronted with the pressures of office, the often split-second decision-making or the constant threat of liability facing police officers, governors and other public officials.

Downs v. Sawtelle, supra at 15. See also Sparkman v. McFarlin, 601 F.2d 261, 274 (7th Cir. 1979).

Finally, we note that the factors this Court has pointed to as softening the im-

pact of absolute judicial immunity do not apply to private parties. There is no appeal from a private party's violation of rights; private persons are not bound by precedent; they are not subject to the control of the legislature or the electorate. See Butz v. Economou, supra, at 512.

The considerations outlined above dictate that private defendants in §1983 actions should not presumptively enjoy derivative immunity from suit. Preserving §1983 relief against private persons acting jointly with immune judges will entail no undue involvement for judges in most cases, and any difficulties that might arise from evidentiary needs should not be extended to immunize private wrongdoers who cannot assert any valid social interest in freeing them from liability for the consequences of their misdeeds. It would be a strange rule of law that denied a judicial remedy to those injured by the private corruption of judges.

CONCLUSION

For the foregoing reasons the judgment below should be affirmed.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1979

No. 79-1186

Orville E. Dennis,

Petitioner,

vs.

Sidney Sparks and R. L. Lynd, d/b/a Sidney Sparks, Trustee,

Respondents.

BRIEF OF AMICUS CURIAE STATE OF FLORIDA

Appeal from the United States Court of Appeals, Fifth Circuit

---

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SUBJECT INDEX

	Page
Table of Authorities	ii
Interest of the Amicus Curiae	1
Argument	2
THE DOCTRINE OF DERIVATIVE IMMUNITY FOR PRIVATE PERSONS SHOULD NOT BE ABOLISHED AT LEAST WITH RESPECT TO A COURT-APPOINTED GUARDIAN AD LITEM	
Conclusion	10

TABLE OF AUTHORITIES

Cases	Page
Bradley v. Fisher 80 U.S. 335, 13 Wall 335, 20 L.Ed. 646 (1872)	2,3
Butz v. Economou 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978)	2,6
Chandler v. Judicial Council 398 U.S. 74, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970)	2
Haldane v. Chagnon 345 F.2d 601 (9th Cir. 1965)	3,4
Hansen v. Ahlgrimm 520 F.2d 768 (7th Cir. 1975)	4
Hazo v. Geltz 537 F.2d 747 (3rd Cir. 1976)	4
Imbler v. Pachtman 424 U.S. 409, 96 S.Ct. 984 47 L.Ed.2d 128 (1976)	3
Kurz v. Michigan 548 F.2d 172 (6th Cir. 1977)	4
Scheuer v. Rhodes 416 U.S. 232, 40 L.Ed.2d 90 94 S.Ct. 1683 (1974)	6
Sparkman v. McFarlin 601 F.2d 261 (7th Cir. 1979)	8

TABLE OF AUTHORITIES (Cont.)

Cases (Cont.)	Page
Sparks v. Duval County Ranch Co., Inc. 604 F.2d 976 (5th Cir. 1979)	3,5,7,8
Spaulding v. Nielson 599 F.2d 728 (5th Cir. 1979)	3
Statutory Provisions	
42 U.S.C. §1983	1,5,6,7

INTEREST OF AMICUS CURIAE

The Florida Attorney General requests leave to appear as amicus in these proceedings to represent the concern of the Florida judiciary that the abolition of derivative immunity will inhibit state judicial processes specifically in that qualified individuals will no longer be inclined to accept court appointments due to the potential for personal liability under §42 U.S.C. §1983. This concern is already demonstrated in Adams v. Salfi, et al., Case No. 80-41-Orl-Civ-R filed in the U. S. District Court, Middle District of Florida, Orlando Division, a §1983 lawsuit alleging conspiracy between a judge and a court appointed guardian ad litem. The State of Florida is concerned for the ability of a state court to appoint guardians if such appointees will be exposed to personal liability and subjected to the expense of time and money in defending such alleged conspiracy claims in the course of their court appointed duties.

This amicus curiae brief is respectfully submitted by the State of Florida, by and through its Attorney General, in

support of petitioner, Orville E. Dennis.

ARGUMENT

THE DOCTRINE OF DERIVATIVE IMMUNITY FOR PRIVATE PERSONS SHOULD NOT BE ABOLISHED AT LEAST WITH RESPECT TO A COURT-APPOINTED GUARDIAN AD LITEM.

This Court has repeatedly affirmed the principle that judicial immunity is an absolute prerequisite for an independent judiciary. In Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2897, 57 L.Ed.2d 895 (1978), the court viewed judicial immunity as the sine qua non of an independent judiciary:

> If a civil action could be maintained against a judge by virtue of an allegation of malice, judges would lose 'that independence without which no judiciary can either be respectable or useful.' Bradley v. Fisher, 13 Wall 335, 20 L.Ed. 646 (1872).

57 L.Ed.2d at 917. Earlier, in Chandler v. Judicial Council, 398 U.S. 74, 84, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970), the court recognized the importance of judicial immunity:

> There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function.

The absolute immunity that judges enjoy exists for the benefit of the judicial system and of the public, not for that of the judge. Randall v. Brigham, 74 U.S. 523, 7 Wall 523, 19 L.Ed.2d 285 (1869); Sparks v. Duval County Ranch Co., Inc., 604 F.2d 976 (5th Cir. 1979). The independent administration of justice rests on the principle of judicial immunity. Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965); Bradley v. Fisher, 80 U.S. 335, 13 Wall 335, 20 L.Ed. 646 (1872). Judicial immunity has been extended to prosecutors for their decisions to prosecute and their conduct of the government's case on the theory that these activities are "intimately associated with the judicial phase of the criminal process . . . ." Imbler v. Pachtman, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976); Spaulding v. Nielson, 599 F.2d 728 (5th Cir. 1979).

The doctrine of derivative immunity has evolved from this time-honored principle of judicial immunity. With the exception of the First Circuit, all Circuit Courts that have considered the doctrine of derivative immunity have upheld it for various reasons. Hazo v. Geltz, 537 F.2d 747 (3rd Cir. 1976); Kurz v. Michigan, 548 F.2d 172 (6th Cir. 1977); Hansen v. Ahlgrimm, 520 F.2d 768 (7th Cir. 1975); Haldane v. Chagnon, 345 F.2d 601 (9th Cir. 1965). The independence of the judiciary, one of the reasons underlying the doctrine of immunity, is the concern of the amicus curiae, State of Florida.

Amicus curiae submits that derivative immunity for a court-appointed guardian ad litem should also be maintained for his decisions in representing his ward on the theory that these functions are intimately associated with the judicial phase of certain civil process. Amicus curiae further submits that the doctrine of derivative immunity as applied to a court-appointed guardian ad litem, like judicial immunity, is equally necessary for the effective and independent administration of justice. Any derivative

immunity that court-appointed guardians enjoy exists for the benefit of the judicial system and of the public, not for that of the guardian. The ability of judges to appoint guardians for judicial proceedings is critical to the effective functioning of our adversarial judicial system.

The broad abolition of derivative immunity will erode the ability of the court to assure the independent administration of justice via court-appointed guardians who will no longer be willing to accept appointments due to the pervasive potential of personal liability under 42 U.S.C. §1983. Even the majority in Sparks, supra, acknowledged that:

> Every trial (or appeal) in state courts, civil or criminal, carries the potential for a conspiracy claim, one that the judge (or judges) and whatever other participants the pleader's fancy may light upon acted in knowing concert to deny federal rights protected by §1983.

at 980. A total abolition of derivative immunity will subject all who may be appointed to assist in a judicial resolution of a dispute, even those cases

pursuing purely private claims, to possible civil rights liability in the federal forum at any time a dissatisfied opponent claimed a violation of a constitutional guarantee. Henceforth, anyone dissatisfied with state litigation can allege a conspiracy and thereby state a claim under 42 U.S.C. §1983.

Even assuming a qualified individual would accept an appointment as guardian absent derivative immunity, the threat of liability for damages in suits under 42 U.S.C. §1983 will deter the guardian from executing his duties with the decisiveness and judgment required for the benefit of the ward and the public. Furthermore, it would be unjust to subject a guardian to liability for exercising discretion which is required by virtue of his duties arising out of the judicial appointment. This rationale is the historical bases for official immunity and is equally applicable to guardians. See Scheuer v. Rhodes, 416 U.S. 232 at 240, 40 L.Ed.2d 90, 94 S.Ct. 1683 (1974), Butz v. Economou, supra. Attaining the

judicial system's adversary goal of complete and adequate representation requires the wide discretion in an appointee, which derivative immunity allows, without which judgment will be hampered by concern over potential personal liability under 42 U.S.C. §1983.

Furthermore, it can be readily seen that the broad abolition of derivative immunity will have the same undesirable effects on other court-appointed private persons, to-wit: translators, attorneys, special masters, receivers, etc. Absent such court appointees, who are intimately associated with the judicial process, the functions of the judiciary will be inhibited. Absent court appointees the judiciary will frequently be unable to properly formulate and implement its decisional functions. This negative impact arising out of the abolition of derivative immunity, particularly as it applies to court appointees, is not "comparatively insignificant" as concluded by the majority in Sparks, supra.

In light of these and other practical considerations, derivative immunity for court-appointed private persons is essential

to the effective functioning of our judicial system. Consequently, this Court should thoroughly explore the sound policy considerations behind such doctrine and the negative implications of its broad abolition. Amicus curiae submits that the broad abolition of derivative immunity will unduly encroach upon the effective and independent administration of justice.

Contrary to the majority opinion in Sparks, supra, derivative immunity serves a greater purpose than "keeping state judges off our witness stands." Sparks, supra, at 981. The purpose of the doctrine of derivative immunity is to promote the effective functioning of the judicial system and serves the additional purposes enunciated by the dissent in Sparks, supra. The dissent, citing Judge Sprecher in Sparkman v. McFarlin, 601 F.2d 261 at 267 (7th Cir. 1979), set forth the policy considerations supporting derivative immunity that the majority in Sparks abandons:

> The first is that frivolous civil rights actions should be discouraged. Second, the federal courts, under the guise of civil rights, should

not monitor and furnish a remedy for each losing party in every state court proceeding, particularly when the state merely furnishes the forum, has no interest in the outcome, and the state judge does no more that preside over a case presented to him by performing discretionary acts, judicial functions and the normal duties of his office. Third, private persons who are victims of, or witnesses to, a crime should not be discouraged from reporting the crime or from following the advice of a prosecuting attorney as to whether to lodge a formal complaint against, or to appear as a witness against, the perpetrator. Similarly, in civil matters, private persons should not be discouraged from or penalized for seeking the aid or judicial approval of a court before embarking upon activities of ambiguous legality. This is particularly important since it can be presumed that if the action is unconstitutional the judge will be more likely to prevent it than the individual engaging in self-help will be to refrain from engaging in it. Fourth, permitting conspiracies to be claimed which include immune judges may expose a judge to the time-consuming effort and chilling effect of submission to discovery and the appearance as a witness. Finally,

> if a judge condones a particular course of conduct, it seems manifestly unfair that the judicial expert should be immunized from attack but that the untutored lay person should be vulnerable to costly attack for participating in the same activity as the judge.

Moreover, amicus curiae submits that in the case of court-appointed guardians (and similarly appointed private persons) derivative immunity is essential because it serves the additional purpose of making available to the Court qualified individuals to serve as appointees, a necessary helping hand in achieving an objective, independent and adversarial judicial system.

CONCLUSION

Court-appointed guardians and other court appointees are intimately associated with the judicial process. They are essential to the effective functioning of our adversarial system. The broad abolition of derivative immunity will erode the Court's ability to make suitable court appointments to the detriment of our judicial system. Wherefore, amicus curiae requests this Honorable Court to reverse the Fifth

Circuit and reaffirm the doctrine of derivative immunity. In the alternative, amicus curiae requests that the doctrine of derivative immunity be affirmed at least in as far as it protects court appointees and particularly guardians ad litem.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

* * *

NO. 79-1186

* * *

ORVILLE E. DENNIS,

Petitioner

V.

SIDNEY SPARKS and R. L. LYND, d/b/a SIDNEY SPARKS, TRUSTEE,

Respondents

* * *

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

* * *

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* * *

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

* * *

STATEMENT

This Brief of the State of Texas is submitted by the Honorable Mark White, Attorney General of the State of Texas, in accordance with Rule 42, paragraph 4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICUS CURIAE

The State of Texas and the judges of the State of Texas are not parties to this case.

Nevertheless, the holding of the United States Court of Appeals for the Fifth Circuit, which is pending before this Court, adversely affects the interests of all the judges of the State of Texas (and of the judges of other

states and of the federal judiciary) by diminishing the protection of judicial immunity which has long been thought to be the backbone of a strong and independent judiciary.

In this case, the general principle or doctrine of judicial immunity was preserved by the Court of Appeals.

However, the Court below further held that, while a state judge is immune from suit under 42 U.S.C., Section 1983, his alleged participation in a conspiracy under that statute confers on the alleged conspiracy the requisite action under color of state law so that a claim can be maintained under Section 1983 against private citizens who are alleged to be the co-conspirators of the judge.

There has been an additional erosion of judicial immunity where the federal courts have upheld the doctrine of judicial immunity in cases where a judge is sued but have awarded attorneys fees against the judge as well as against other defendants in the lawsuit.

The State of Texas feels that both the decision being reviewed, permitting joinder of private alleged conspirators with a state judge in a 1983 conspiracy case which perforce requires the judge to become a defense witness to deny his participation in the asserted conspiracy, and the decisions awarding attorneys fees against an otherwise immune judge, undermine the doctrine of judicial immunity and will weaken the entire judiciary of this country, both state and federal.

ARGUMENT

The decision of the Court of Civil Appeals runs counter to the purpose, reason and philosophy for the doctrine of judicial immunity. The decision permits a conspiracy to be alleged under 42 U.S.C., Section 1983 against private persons who are not acting under color of state law if it is alleged that they were acting and

conspiring with the state district judge who will provide the requisite state action.

The decision converts every state judicial determination into a potential 1983 case where one of the litigants, as is almost always the case, is dissatisfied with the decision. Every state case, whether it be a contract case, an employment termination case, or a tort claims case provides the raw material for a federal lawsuit when couched appropriately as a conspiracy under Section 1983.

The decision forces a state judge to become a witness in a civil rights case. If the desire to vindicate his honor and integrity will not bring him into the federal judicial arena to deny the conspiracy and any complicity or wrongdoing, due process and fundamental fairness require that the judge be a witness for the private-person defendant-conspirators so that their due process rights to defend against the alleged conspiracy can be protected. Even federal judges are not immune from the decision of the Court of Appeals. Where a state prisoner is dissatisfied with the decision in the federal habeas corpus case and alleges a conspiracy on the part of state officers who do not enjoy either judicial immunity or quasi-judicial immunity, *i.e.*, a state sheriff, a state police officer and others enjoying only the defense of good faith immunity, and such officers who are alleged to have acted in concert with the federal judge making the decision, the federal judge becomes an involuntary and unwitting witness in the defense of the asserted conspiracy. The decision below provides a good example of possibilities opened up by the courts holding. The litigants below who sought to pierce the veil of judicial immunity surrounding the state district judge and lost could allege a conspiracy under 42 U.S.C., Section 1983 on the part of their opposing private litigants, the federal judges, and the state judge to provide the requisite state action. While the judges, both state and federal, would be immune from the award of damages, they would become needed and perhaps necessary (in

fundamental fairness terms) witnesses for the private defendants.

In another area, the doctrine of judicial immunity has been sapped of some of its strength. There is pending before this Court, the case of *Consumers Union of the United States, Inc. v. American Bar Association*, 470 F.Supp. 1055 (E.D. Va. 1979), cert. granted ____U.S.____, 162 L.Ed. 269 (1979), in which the lower courts awarded attorneys fees against members of the state judiciary. Three consolidated by a district court of Texas have followed this principle, the lead case being *Rheuark v. Shaw, et al.*, No. CA3-76-171-F, decided by the United States District Court for the Northern District of Texas. In those cases, the state judge was named as one of the defendants in three 1983 actions where the state record on appeal was tardily prepared to the detriment of their plaintiffs in the cases. The district court found that the state judge was immune but found that he was subject to attorneys fees. The great blow to the doctrine of judicial immunity struck in this district court decision is sharply illuminated by the circumstance that a total of Three Thousand Two Dollars ($3,002) were awarded as damages to three plaintiffs while a total of over Fifty Thousand Dollars ($50,000) in attorneys fees was awarded to the plaintiffs and against the defendants including the judge. (A copy of the Court's judgment in the three cases is attached; the cases are now on appeal to the Court of Appeals for the Fifth Circuit, Docket No. 79-3213). Perhaps the judiciary may hope for the abolition of the doctrine of judicial immunity as to damages in return for a doctrine of immunity against liability for attorneys fees. Certainly, the philosophy that judicial immunity promotes a strong independent and fearless judiciary is seriously undermined by these decisions.

CONCLUSION

To preserve the integrity of the judicial system, the decision of the Court of Appeals permitting the joinder

of a state district judge with private persons in an alleged 1983 conspiracy should be reversed. Additionally, this *Amicus Curiae* respectfully suggests that the Court reverse the decision in *Consumers Union of the United States, Inc. v. American Bar Association*, 470 F.Supp. 1055 (E.D. Va. 1979), cert. granted ____U.S.____ 162 L.Ed. 269 (1979) where attorney fees were awarded against members of the state judiciary.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of the State of Texas as Amicus Curiae in Support of Petitioner have been deposited with the United States Postal Service, with proper first-class postage affixed thereto, certified mail, return receipt requested, addressed to each of the following parties, or where represented by counsel, to the counsel of record in the court below: Mr. Garland Smith, P.O. Drawer 1104, Weslaco, Texas 78596; Mr. Clarence Martens, No. 5 Northwood, Del Mar Hills, Laredo, Texas; Mr. Raul Garcia, 208 N. Cameron, Alice, Texas 78332; and Mr. Finley L. Edmonds, P.O. Box 2624, 1515 Bank & Trust Tower, Corpus Christi, Texas 78403.

_____

LONNY F. ZWIENER

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
AUG 31 1979
JOSEPH McELROY, JR.
BY Pam Hall D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JACK RHEUARK VS. BILL SHAW, CLERK OF DALLAS COUNTY COURTS, ET AL	)	NO. CA3-76-0171-F
JOHN D. DOESCHER VS. PAUL T. BASTAS, COURT REPORTER, ET AL	)	NO. CA3-76-1336-F
ROBERT ALLEN JORDAN VS. PAUL T. BASTAS, ET AL	)	NO. CA3-77--0444-F

JUDGMENT

It is ORDERED that Plaintiff Rheuark shall recover $1.00 nominal damages, Plaintiff Doescher shall recover $1.00 nominal damages, and Plaintiff Jordan shall recover $3,000 from the County of Dallas, Texas. Interest on $3,002.00 is awarded at 9% per annum.

It is further ordered that Plaintiff Rheuark's attorneys shall recover $17,082.34 as attorneys fees, Plaintiff Doescher's attorney shall recover $14,256.00 as attorneys fees and $358.59 as expenses, Plaintiff Jordan's attorney shall recover $17,269.45 as attorneys fees and $112.64 as expenses, and John T. Mitchell shall recover $1,270.50 attorneys fees and $100.00 expenses, all to be recovered as a part of the costs from the individual defendants in their official capacities and from the County of Dallas, Texas. All other costs are hereby taxed against the individual defendants in their official capacities and the County of Dallas, Texas.

UNITED STATES DISTRICT JUDGE

DATE August 31, 1979



